New Zealand Banking Association
Te Rangapū Pēke

Submission

to the

Ministry of Business, Innovation and Employment

on the

Discussion Document: *Promoting competition in New Zealand – a targeted review of the Commerce Act 1986*

7 February 2025

NEW ZEALAND BANKING ASSOCIATION – TE RANGAPŪ PĒKE
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About NZBA

1. The New Zealand Banking Association – Te Rangapū Pēke (**NZBA**) is the voice of the banking industry. We work with our member banks on non-competitive issues to tell the industry's story and develop and promote policy outcomes that deliver for New Zealanders.

2. The following eighteen registered banks in New Zealand are members of NZBA:

- ANZ Bank New Zealand Limited
- ASB Bank Limited
- Bank of China (NZ) Limited
- Bank of New Zealand
- China Construction Bank (New Zealand) Limited
- Citibank N.A.
- The Co-operative Bank Limited
- Heartland Bank Limited
- The Hongkong and Shanghai Banking Corporation Limited
- Industrial and Commercial Bank of China (New Zealand) Limited
- JPMorgan Chase Bank N.A.
- KB Kookmin Bank Auckland Branch
- Kiwibank Limited
- MUFG Bank Ltd
- Rabobank New Zealand Limited
- SBS Bank
- TSB Bank Limited
- Westpac New Zealand Limited

Contact details

3. If you would like to discuss any aspect of this submission, please contact:

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Introduction

4. NZBA welcomes the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on the Discussion Document: *Promoting competition in New Zealand – a targeted review of the Commerce Act 1986* (**Consultation**). NZBA commends the work that has gone into developing the Consultation.

5. This submission is focused on Issues 6 – 8 of the Consultation. Our responses are set out in detail below, but in summary:

   5.1. We consider that information sharing and collaboration within industries should be better facilitated and promoted. In our view, the best choice is to develop a simple notice regime where collaborators advise the Commission of proposed collaboration, and if the Commission does not object, no action will follow. Class exemptions may also be helpful.

   5.2. Any reforms to prohibit 'concerted practices' will require careful consideration to avoid inadvertently capturing pro-competitive forms of information-sharing by third parties.

   5.3. We support the proposal for industry codes or rules to be prescribed in the Commerce Act, and consider the Commission should take a broad view when implementing them, such as through consideration of how any such codes or rules would impact existing codes or rules, as well as other regulators.

Issue 6: Facilitating beneficial collaboration

6. NZBA agrees that information sharing and collaboration within industries should be better facilitated and promoted.

7. Banks often need to respond quickly to emerging risks and trends in the economy and markets. There are clear advantages to consumers – and to financial stability – where banks are more easily able to collaborate on matters impacting the sector.

8. The regulatory environment for conduct is also moving towards a more principle-based approach. Examples of this shift include the climate reporting requirements and upcoming Conduct of Financial Institutions (**COFI**) regime.

9. While this approach allows banks to manage conduct risk in a manner appropriate to their business models, it does create uncertainty around how regulatory principles should be met and what evidence can be used to support compliance. Providing more flexibility to share information and approaches to regulatory compliance could support greater consistency and best practice, which in turn should promote better outcomes for New Zealand and consumers.

Question 15: Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.

10. In our view, uncertainty about how the Commerce Act applies can hinder industry discussions on issues that need a joint approach to benefit consumers.

11. Banks are reluctant to discuss matters with competitors that a regulator could view as cartel conduct or leading to an understanding or arrangement which constitutes a cartel, even where the dominant purpose is not to lessen competition.

12. Any arrangement or understanding containing a cartel clause is likely to be subject to regulatory scrutiny. Even if banks were confident the dominant purpose was not to lessen competition, banks may be unwilling to accept the risk that the regulator takes a different view.

13. This uncertainty can drive industries to avoid discussions entirely, or significantly limit their nature and scope, meaning the consumer benefit of collaboration is unlikely to be realised. The process to seek authorisation from the Commission can be uncertain and can lead to significant delays, further impacting any benefits to consumers that could be realised.

14. Similarly, industry discussions around standardising how mortgage advisers can prove to financial institutions that they have met their COFI duties has not progressed, given perceived competition risks.

15. Some of the Commission's Personal Banking Services Market Study (**Market Study**) recommendations may require a collaborative industry approach. For example, the industry may need to work together to address basic bank accounts, and develop and apply industry standards for comparing home loan offers.

16. Without the Commission confirming those discussions and eventual approach or arrangements fall within the collaborative activity exception, our members view industry engagement as risky. As such, any collaboration and outcomes risk becoming more muted.

17. The industry has also spent considerable time and cost to ensure discussions on fraud and scam prevention, and scam compensation frameworks, fall within the collaborative activities exemption, including retaining external legal expertise.

18. As such, concerns around competition risk have, at times, unnecessarily constrained discussions, and likely consumer benefits, from agreeing how banks should respond in specific scenarios under the scam commitments the industry will make.

Question 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?

19. NZBA considers it would be difficult to provide enough clarity within the Commerce Act itself to satisfactorily de-risk beneficial collaboration that would enable banks to reach arrangements or understandings that might be perceived to be cartel conduct or constitute a cartel.

20. With the breadth of collaboration likely subject to the cartel provisions, any clarity in the Act would be necessarily high-level, with doubt likely to continue about how the provision applies in particular circumstances. Banks are unlikely to accept the risk of the significant financial and reputational results of a Commerce Act breach in entering any arrangements without an explicit exemption, noting that cartel conduct is also a criminal offence in New Zealand.

Question 17: What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

21. For the reasons outlined above, we do not consider that Commission guidance (option 1) or a statutory safe harbour (option 2) would de-risk collaboration.

22. In our view, the best choice is to develop a simple notice regime where collaborators advise the Commission of proposed collaboration, and if the Commission does not object, no action will follow.

23. Class exemptions may also be helpful, as these would remove the need to give notice to the Commission regarding specified types of collaboration. A notice regime would complement this approach by capturing any proposed collaboration that does not fall squarely within the exemptions.

Question 18: If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?

24. Any reform to promote beneficial collaboration must be quick and inexpensive.

25. The framework also needs to be clear about when it can be engaged, and set out expectations on information needed and appropriate timeframes.

26. Importantly, the framework must provide timely certainty that the Commission will not take any action because of the collaboration if it has not objected following notice.

Issue 7: Anti-competitive concerted practices

27. We consider care is needed to ensure any reforms in this area do not capture pro-competitive forms of information sharing by third parties.

28. For example, banks may receive information about credit policies and pricing of other lenders through mortgage advisers, acting as advocates for consumers.

29. The purpose of providing that information is to actively encourage banks to adjust their settings and pricing to meet or better their competitors, actively improving and promoting competition.

30. In the Market Study, the Commission found that mortgage advisers exert positive competitive pressure on lenders for the benefit of consumers. Mortgage advisers invite lenders to compete more strongly for business.[1] Information sharing for this purpose should be supported, and care taken to ensure any changes or clarification of the concerted practices provisions do not unnecessarily inhibit pro-competitive activities.

Issue 8: Industry Codes or Rules

31. NZBA supports the proposal for industry codes or rules to be prescribed in the Commerce Act. They should be used to address sector-specific issues, as this will achieve a more targeted response. This may also reduce potential compliance costs on some companies.

32. Limiting the scope of codes or rules may also allow test cases to be trialled in some industries and, if successful, applied to other sectors in the future.

33. In terms of design, we support a small set of rules or codes in a small number of documents, under as few regulators as possible.

34. Financial services regulation is complex and fragmented. Rules and codes with similar objectives sit across different regimes and regulators, which has created a significant compliance burden. On some issues, multiple regulators need to be advised or engaged on the same issue.

35. None of this is conducive to supporting competition in the banking sector. Before developing industry codes or rules, we strongly suggest the Commission consider how it would impact existing financial services codes or rules and other regulators.

[1] See paragraph 4.108 Final report – Personal banking services market study 20 August 2024 – Amended 27 August 2024.