NZCTU
Te Kauae Kaimahi

Submission to the Ministry for Business, Innovation and Employment on:

Promoting Competition in New Zealand: A Targeted Review of the Commerce Act 1986

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi

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This submission is made on behalf of the 32 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (NZCTU). With over 340,000 union members, the NZCTU is one of the largest democratic organisations in New Zealand.

The NZCTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (NZCTU), which represents approximately 60,000 Māori workers.

1. Introduction

1.1. The NZCTU supports a strengthening of the Commerce Act 1986. We have seen a general trend of market consolidation across multiple sectors of the New Zealand economy. Concentrated market power is evident across critical sectors such as banking, energy generation and supply, groceries, telecommunications, building materials, fuel retail, and some digital platforms. This suggests that New Zealand's competition policy settings are not functioning particularly well.

1.2. In addition to the negative implications for productivity (and thus wages) highlighted by MBIE in the consultation document, the lack of competition in these sectors is a contributing factor to the high cost of living in New Zealand. Firms with significant market power can charge higher prices (and/or pay lower wages) than they could in properly competitive markets (or, in some cases, if those services were publicly owned and delivered, and therefore not subservient to the profit motive). Working households are the ones who bear the burden of these higher costs/lower wages. Uncompetitive markets (or, equally importantly, improperly marketized public services) therefore serve to transfer wealth from working households to the owners of a small number of highly profitable firms.

1.3. The NZCTU's view is that effective competition policy requires clear red lines, effective penalties for anti-competitive conduct, and a strong and well-resourced regulator that is empowered to proactively discipline anti-competitive behaviour and prevent anti-competitive mergers. It also requires sector-specific regulation in cases where oligopolistic structures have consolidated, or natural monopolies occur – and in some cases, the appropriate action may be to return certain assets to public ownership.

1.4. In our view some of the options being considered in the consultation document could make a positive contribution to improving competition in New Zealand. In section 2 we outline our support for selected proposals that we think will enhance the effectiveness of the Commerce Act. We also highlight several issues not covered by the consultation document where we believe further reform to the Act may be warranted.

1.5. Consistent with the above comments, we want to stress that changes to the Commerce Act alone will not be sufficient to reduce problematic concentrations of market power in some sectors. A broader policy response is required, targeting the sector-specific roots of market concentration in key areas of the New Zealand economy – we discuss this in section 3.

2. Reforms to the Commerce Act 1986

The "substantial lessening of competition test"

2.1. Once market concentration occurs, it can be very difficult to undo. It is therefore critical that the Commerce Commission is empowered to effectively block acquisitions that would have the effect, or potentially have the effect, of increasing market power and materially reducing competition.

2.2. For this reason, the NZCTU supports the proposal to clarify that the "substantial lessening of competition" includes an acquisition having the effect, or being likely to have the effect, of "creating, strengthening, or entrenching a substantial degree of market power in a market". This should strengthen s 47 of the Act by focusing attention on the potential impact of the acquisition on the market power of the relevant parties and providing guidance to the courts regarding what constitutes a substantial lessening of competition. It would have the further benefit of aligning with the new Australian regime.

2.3. It is important that this clarification, however, not be interpreted to restrict the circumstances in which a substantial lessening of competition is judged to be a risk – i.e., the substantial lessening of competition test should include, but not be limited to, the effect or likely effect of "creating, strengthening, or entrenching a substantial degree of market power in a market". The wording provided in the recent Australian amendment Act suggests an appropriate direction:

> "(4) *For the purposes of this Part, the acquisition may have the effect or be likely to have the effect of substantially lessening competition in a market if the acquisition would, in all the circumstances, have the effect, or be likely to have the effect, of creating, strengthening or entrenching a substantial degree of power in the market.*"

2.4. The above comments notwithstanding, we would also welcome consideration of a revision to the term "substantial lessening" itself. It sets an unnecessarily high bar for proving that an acquisition would be deleterious to competition. We recommend that "substantial lessening" is replaced with "material lessening". This would set a more appropriate bar for the prevention of acquisitions with anti-competitive consequences, without lowering it so far as to be unworkable.

2.5. This is particularly important in markets that already have a high degree of market concentration. For example, in 2003 the Commerce Commission green-lighted ANZ Banking Group's acquisition of The National Bank from Lloyds TSB on the basis that "the proposed acquisition would not have, nor would be likely to have, the effect of substantially lessening competition in the relevant markets due to the competition provided by the other major banks".[1] Yet while it may not have "substantially lessened" competition, the merger did cause a further concentration of market power in an already concentrated sector. As the Commission has reported in its recently completed market study of the retail banking sector, the big four banks "do not face strong competition",

[1] Commerce Commission, "ANZ Bank cleared to acquire National Bank", 25 September 2003.

and are earning super-normal profits as a result. This highlights the problems with relying on the current test in the case of markets that are already highly concentrated.[2]

Serial or creeping acquisitions

2.6. The NZCTU supports reforming the Act to enable the Commerce Commission to address the problem of "serial" or "creeping" acquisitions. This would enable the Commission to consider the effect of an acquisition as the combined effect of the acquisition and earlier similar acquisitions within a given period. New Zealand has seen serial acquisitions reduce competition in sectors such as fuel retail (e.g., Z Energy's acquisition of smaller competitors) and online marketplaces (e.g., Trade Me's acquisition of smaller digital marketplace platforms).

2.7. We also recommend that a clause covering serial acquisitions should cover not only "firms supplying or acquiring the same goods or services", as outlined in MBIE's consultation document, but also goods and services "that are substitutable for, or otherwise competitive with, each other", as in the new Australian regime. This would make the new clause more comprehensive.

Mergers outside the clearance process

2.8. As noted above, it is crucial that potentially harmful mergers can be blocked before they occur. We therefore strongly support providing the Commerce Commission with additional powers to address non-notified mergers.

2.9. We support the proposals to provide the Commission with both stay and hold powers – enabling the Commission to suspend the completion or implementation of a potentially anti-competitive merger without having to apply for a court injunction – and call-in powers – enabling the Commission to require parties to apply for a clearance.

2.10. This is important because, in applying for court injunctions to stop unnotified acquisitions, it is up to the Commission to prove to the court the anti-competitive effects of the acquisition. Given the complexity and time-consuming nature of this task, this puts the Commission on the backfoot from the beginning. For these reasons, the OECD has recommended that the Commission is provided with both stay and hold and call-in powers.[3]

2.11. Finally, we support providing the Commission with company-specific mandatory notification powers. This would enable the Commission to require certain companies with already substantial market power to notify the Commission of all acquisitions. Given New Zealand's well-known problems of market concentration across multiple sectors, this is a commonsense reform.

2.12. Taken together, these additional powers would help the Commission prevent potentially problematic acquisitions from slipping through the net. They would also enable the

[2] Commerce Commission, *Personal Banking Services: Final Competition Report – Executive Summary*, 2024, p. 3.
[3] OECD, *OECD Economic Surveys: New Zealand*, 2024, p. 70.

Commission to get ahead of serial acquisitions and non-merger acquisitions that are small in isolation but lead to a progressive concentration of market power over time.

Anti-competitive concerted practices

2.13. We support aligning the Commerce Act with the Australian prohibition on concerted practices that substantially lessen competition – e.g., coordinated price signalling. As MBIE notes in the consultation document, there is a gap in the current coverage of New Zealand's competition law to address this kind of tacit collusion. It is wholly appropriate to fill this gap.

2.14. We note, however, that the problem of "conscious parallelism" – i.e., oligopolistic conduct without tacit or explicit collusion – would remain unaddressed. Conscious parallelism is a clear problem in some markets in New Zealand. Banking, for example, has recently been under the spotlight, with the Commerce Commission finding that the major banks routinely price match on mortgage and term deposit rates. Addressing oligopolistic behaviour such as this requires policy responses beyond the scope of the Commerce Act – which we discuss further below.

Modernising court injunction powers

2.15. We support modernising court injunction powers to enable for both restraining and performance injunctions. This will align injunctions with the sector-specific policies the Commerce Commission administers, as noted by MBIE in the consultation document. This would be a positive step in providing further powers to the Commission and the courts to actively pursue and discipline anti-competitive conduct.

Burden of proof

2.16. Currently, the burden of proving that a proposed acquisition will, or is likely to, have anti-competitive effects lies with the Commerce Commission. Given the complexity of this task, and the high threshold that must be cleared, it can be very difficult to prove decisively that a merger would be anti-competitive.[4] This means very lengthy and time-intensive investigations by the Commission. This may act as a disincentive for the Commission to pursue litigation in some cases where it is warranted, due to a need to husband scarce resources.

2.17. The NZCTU therefore recommends investigating options for reversing the burden of proof in certain circumstances. Specifically, we would welcome consideration of reversing the burden of proof in sectors that already have a high degree of market concentration or would have a high degree of market concentration following a proposed merger.

2.18. As outlined by the OECD, this principle – the so-called "structural presumption" – is applied in the United States on the basis that, because market concentration "is so inherently likely to lessen competition substantially", in sectors that are already highly concentrated it is the merging parties who should be required to prove that competition

[4] The OECD has noted that "the applicable burden of proof that the NZCC is required to meet seems at times too high". OECD, *OECD Economic Surveys: New Zealand*, 2024, p. 69.

in the market will not be diminished.[5] As the OECD puts it, "market concentration creates a rebuttable presumption of anti-competitiveness, and merging parties must demonstrate the lack of anticompetitive effects".[6]

2.19. The approach thereby acknowledges the well-established and empirically supported findings that: (i) the loss of a competitor in a concentrated market is very likely to increase the market power of the remaining firms; and (ii) concentrated markets typically have high barriers to entry (in New Zealand, high barriers to entry are clear in the concentrated markets of banking, energy, grocery, and telecommunications, for example).[7]

2.20. Reversing the burden of proof in these instances would strengthen the Commerce Commission's ability to prevent acquisitions that are not in the public interest, without placing an unfair burden on firms operating in more competitive markets.

Strengthening the regulator

2.21. An Act is only as strong as the regulator that enforces it. To this end, it is critical that any reforms to the Commerce Act intended to improve competition in New Zealand are accompanied by a strengthening of the Commerce Commission's capacity to proactively investigate and act against anti-competitive behaviour.

2.22. A key issue here is the need to improve the Commission's litigation budget, which for years has been too small relative to some of the firms it has taken legal action against. In lieu of a sufficient budget, the Commission risks being intimidated by deep-pocketed corporates with the capacity to engage in costly and drawn-out litigation.

3. A broader policy response is also needed

3.1. Although a strengthening of the Commerce Act is welcome, this alone will not be sufficient to address the competition problems evident in key sectors of the New Zealand economy. As noted in the introduction, multiple sectors in New Zealand are oligopolistic in structure, and there is compelling evidence in many cases that this market power is either abused or not in the public interest.[8] Improving outcomes for the public will therefore also require other sector-specific policy responses from government. The example of the banking sector will suffice to illustrate this point.

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[5] See OECD, *OECD Economic Surveys: New Zealand*, 2024, p. 70; OECD, *Start-ups, Killer Acquisitions and Merger Control*, 2020, p. 38

[6] OECD, *OECD Economic Surveys: New Zealand*, 2024, p. 70.

[7] For a survey of this evidence in the United States context, see Herbert Hovenkamp and Carl Shapiro, "Horizontal Mergers, Market Structure, and Burdens of Proof", *Yale Law Review*, 2018, pp. 2001–2008.

[8] On banking, see Commerce Commission, *Personal Banking Services: Final Competition Report*, 2024, chapter 6. On electricity, see Geoff Bertram, "Weak Regulation, Rising Margins, and Asset Revaluations: New Zealand's Failing Experiment in Electricity Reform", in *Evolution of Global Electricity Markets: New Paradigms, New Challenges, New Approaches*, 2013; NZCTU, 350 Aotearoa, FIRST Union, *Generating Scarcity: How the Gentailers Hike Electricity Prices and Halt Decarbonisation*, 2023. On the grocery sector, see Commerce Commission, *Market Study into the Retail Grocery Sector: Final Report*, 2022.

3.2. As MBIE is aware, the Commerce Commission has found that the big four commercial banks "do not face strong competition".[9] The smaller banks (including Kiwibank) do not pose a credible threat to the market share of the big four, there is only "sporadic" competition for home loans and deposit accounts between the big four, and the prevalence of price matching has likely "reduced the incentives to compete hard on interest rates".

3.3. The result of this lack of competition is that the big four rank in the top quartile internationally in terms of the key profitability indicators for banks: return on equity, return on assets, and net interest margin. This is despite the fact that most banking activities in New Zealand are of a relatively low risk, "plain vanilla" type. The Commission thus finds that "at least part of the profitability we see is explained by the market power of the major banks" – in other words, the big four are earning super-normal profits due to the lack of competition in the sector; this constitutes a wealth transfer from working households and businesses to the shareholders of these banks.

3.4. The Commission also finds that the lack of competition is at least partially responsible for the lack of innovation and investment in modernising banking systems in New Zealand – which is to the detriment of the public.

3.5. In its final report, the Commission therefore recommends a mutually reinforcing suite of actions be taken to improve competition in the banking sector. This suite includes the government sufficiently capitalising Kiwibank, to enable it to compete with the big four, accelerating progress on the development of open banking, and ensuring the regulatory environment for banking enables competition, among other actions.

3.6. This same logic applies across other problematic sectors of the New Zealand economy, including energy, groceries, and building supplies. Each sector will require a range of vigorous regulatory responses to reduce the concentration of market power.

3.7. This raises a separate but related issue: the value of certain services being publicly owned and operated, rather than subject to market forces (be they competitive or uncompetitive market forces). There are multiple cases in New Zealand where partial or full privatisation of publicly owned and operated services has led to poorer outcomes for the public: energy generation and supply, rail transport, and telecommunications stand out. Although this is outside the scope of the current review, we flag the issue here as an important contributing factor to the problematic consolidation of market power in many sectors of the economy. In some cases, the best option is to return assets to public ownership.

4. Conclusion

4.1. The NZCTU thanks MBIE for the opportunity to submit on this consultation. We support a strengthening of the Commerce Act 1986 to better empower the Commerce

[9] Commerce Commission, *Personal Banking Services: Final Competition Report – Executive Summary*, 2024, pp. 3, 4, 5, 8–10.

Commission to address anti-competitive acquisitions and conduct. We also reiterate the importance of sector-specific interventions to reduce problematic concentrations of market power that contribute to the high cost of living for working people.

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Privacy of natural persons