Friday 7 February 2025

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Tēnā koutou

A targeted review of the Commerce Act 1986

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the discussion document *"Promoting competition in New Zealand - A targeted review of the Commerce Act 1986"*, released on 5 December 2024.

We welcome your further consideration of the issues as raised in this submission.

Ngā mihi nui

Privacy of natural persons

Raewyn Bleakley
Chief Executive
NZ Food & Grocery Council

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PROMOTING COMPETITION IN NEW ZEALAND - A TARGETED REVIEW OF THE COMMERCE ACT 1986

Discussion Document

Submission to the Ministry of Business, Innovation, and Employment by the New Zealand Food & Grocery Council

7 February 2025

PROMOTING COMPETITION IN NEW ZEALAND - A TARGETED REVIEW OF THE COMMERCE ACT 1986

NEW ZEALAND FOOD & GROCERY COUNCIL SUBMISSION

1. INTRODUCTION

1.1 The New Zealand Food & Grocery Council (NZFGC) submits this response to the discussion document "Promoting competition in New Zealand - A targeted review of the Commerce Act 1986," released on 5 December 2024. Our submission focuses on key issues as they relate to the grocery market, reflecting our current understanding and experience of the Act. We highlight the importance of balancing regulatory interventions with practical considerations, ensuring that any changes promote fair competition and consumer protection while supporting growth and industry success. NZFGC has not commented on every issue raised in the submissions but has provided comment on matters where beneficial to provide feedback, direction, and urge further consideration.

2. MERGERS – ISSUES 1 TO 5

Issue 1: Substantial Lessening of Competition Test

2.1 The discussion document proposes updating the substantial lessening of competition (SLC) test and seeks views on this change. The current merger regime under the Commerce Act is generally effective in preventing anti-competitive mergers, with the SLC test proving effective in many cases.

2.2 However, there may be benefit in further aligning the SLC test with Australian competition law, given the importance for businesses operating across the Tasman, as it provides alignment and reduces compliance costs, promoting a Single Economic Market. As a general principle, harmonisation should occur where there is a clear net economic benefit to New Zealand, as it does in other areas such as our food regulations. We also see that there would be benefit when it comes to legal precedent, as aligned jurisprudence could provide clearer guidance for businesses, with a greater body of legal precedent to draw from when examining clearances and having further clarity on application matters.

2.3 We note BusinessNZ's comments that as the planned changes in Australia do not commence until 2026 that it may be prudent for New Zealand to wait and observe whether this is the right course of action and have a better understanding of trans-Tasman implications. However, we would encourage further consideration of this proposal, given the benefits outlined above.

Issue 3: Assets of a business

2.4 While NZFGC is not in a position to provide detailed technical comment on this proposal, we believe that the current definition within the Commerce Act could benefit from further clarity, with the status quo having some uncertainty for various acquisitions, including machinery, licences and undeveloped land where it is unclear

how that land will be used. We can see the benefit for further consideration and clarification.

Issue 4: Mergers outside the clearance process

2.5 As the discussion document sets out, the clearance regime under the Commerce Act has operated on a voluntary basis, allowing merger parties to apply for clearance or proceed without it, though noting the latter can lead to court proceedings and pecuniary penalties. Despite being one of the few OECD countries with a voluntary merger regime, New Zealand's system is generally considered effective.

2.6 However, as the discussion document sets out the 2022 OECD Economic Survey recommended granting the Commission a 'call-in' power to order clearance applications, which could take various forms. Introducing additional powers should be carefully considered. One option could that the call-in powers there should apply a reverse onus of proof, that the Commission themselves should prove that there is SLC.

2.7 Regardless, it remains crucial to continue mitigating risks and educating businesses about the benefits of obtaining clearance. Additionally, updating and providing clear guidance to businesses is essential to ensure they are well-informed about the voluntary clearance regime and its requirements, we would encourage further activity to support this outcome.

Issue 5: Behavioural undertakings

2.8 This review highlights the potential for significant improvements in merger law, with the consideration of accepting behavioural undertakings should be given further consideration by the Government. We agree with BusinessNZ that it is useful to examine whether commitments by merging parties to modify their post-merger behaviour to address competition concerns while allowing the merger to proceed should be permissible in New Zealand. Behavioural undertakings offer flexibility in addressing competition issues, preserving market dynamics, encouraging pro-competitive outcomes, and facilitatingcross-border mergers. However, they also come with potential costs, such as the need for robust monitoring and enforcement mechanisms by the Commission to ensure such undertakings are adhered to.

2.9 We note in other jurisdictions, it is at the regulator's discretion to accept any undertakings, and the regulator develops criteria to monitor and enforce them. If a breach is less likely to be detected, these undertakings are less likely to be accepted. Consequently, the ability to detect such issues constitutes an additional responsibility, one that necessitates appropriate resourcing. We would strongly urge that this additional power be contemplated in a way that can be practically operationalised.

3. ANTICOMPETITIVE CONDUCT – ISSUES 6 & 7

Issue 6: Facilitating beneficial collaboration

3.1 There is an opportunity to mitigate the current chilling effect and concerns around collaboration on various issues, ranging from best practice guidance to support supply chain availability, industry best practice, to emissions reduction action. NZFGC is aware of a number of such matters which would immediately benefit from such provisions. Any changes must be pragmatic and workable. As such, government should undertake further work to facilitate beneficial collaboration under the Commerce Act and provide protections to facilitate this work.

3.2 We would support the Commission issuing clear guidance on their approach to various implementation or enforceable issues, as there is benefit to have further clarity and guidance for businesses. Having the commission issue guidance in how they are going to approach issues would also be of benefit. However, it would be better to have further case law to support these guidelines, rather than allow for additional guidelines making powers through legislation.

3.3 The discussion document gives five options to empower the Commission, and Option 4, “own initiative, to make class exemption” seems to be one way in which to provide a broader solution to positively affect a number of businesses at the same time. Further consultation with businesses regarding this would be of benefit.

Issue: 7 Anticompetitive concerted practices – heightened risk of coordinated conduct

3.4 We echo the concern raised by BusinessNZ about the impact of the prohibition on the standard practices of industry associations regarding perceived issues relating to anti-competitive concerted practices. The discussion document takes the view that such activity between industry associations and its members is an example of parties communicating commercially sensitive information with each other to limit competition between them.

3.5 However, in such activities as referenced by the discussion documents, industry associations aim to evaluate members' performance neutrally, fostering improvement and competitiveness. They will act as neutral intermediaries to aggregate and anonymize data, mitigating misuse and competition concerns. They handle sensitive information confidentially, maintaining trust among members. Their expertise and sector-wide understanding allow them to manage data for the industry's benefit, supporting benchmarking and policy advocacy. This role likely enhances market strength and provides a net economic benefit, outweighing the uncertain and minimally enforced prohibition.

3.6 NZFGC encourages that further understanding is sought on this and we support the recommendation of BusinessNZ to maintain the generic prohibitions requiring

evidence of a 'contract arrangement or understanding' to establish anticompetitive collusion.

4. CODE OR RULE-MAKING POWERS AND OTHER MATTERS – ISSUES 8 TO 11

Issue 8: Industry Codes or Rules

4.1 We share the concern expressed about potential overreach in replacing market studies with voluntary or mandatory codes. While there are benefits, it risks lacking the currently established participation, oversight, and decision-making. Therefore, it is essential to ensure these checks are in place to avoid the risks of blunt codification. As BusinessNZ has recommended, with options, Government should further consider a broader range of options to adopt a more flexible and proportionate response to addressing competition concerns.

Issue 10: Protecting confidential information

4.2 NZFGC remains concerned that the current approach to confidentiality and OIA requests is deterring suppliers from providing information to the Commission and deterring other market participants from submitting on, or participating in, processes. Suppliers have expressed hesitation to raise issues with the Commission and other government agencies due to the disclosure obligations under the Official Information Act 1982 (OIA).

4.3 While we have been encouraged by recent comments from the Commission and Grocery Commissioner to provide us with reassurances around confidentiality and sensitive information, any information provided is still subject to the OIA, which requires the release of information upon request unless there are 'good reasons' or exemptions to withhold it. We note, this includes information provided through the Commission's Anonymous Reporting Tool, which we will expand on further below. While NZFGC believes there are often important confidentiality considerations to withhold such information, disclosure still may be required under the OIA or, as has been relied upon in previous instances, that the need to apply 'natural justice' principles to investigations trumps the adverse impacts to the party making such sensitive disclosures.

4.4 We would also note that the effectiveness of any information disclosure process under the OIA largely depends on its operability, to enable the provisions of the Act itself – that is, what the Commission applies in practice. While the Commission is required and does consult about the release of information, NZFGC is also aware of examples where suppliers did not have sufficient understanding of the limitations of any confidential assurances or undertakings when providing information. We are also aware that in some cases there has been insufficient opportunity to comment on the proposed release of their information for various reasons – such as only being given

48 hours notice. In both examples this can deter suppliers to provide information, as they are hesitant to fully engage with the Commission. While there have been recent procedural improvements to address such concerns in practice, it remains a live concern for the purposes of protecting confidential information in such disclosures.

4.5 In light of these points, we would be disappointed if MBIE's preliminary view remains that the OIA strikes the right balance. The current protections are insufficient, and MBIE should consider ways to provide more certainty about what will and will not be kept confidential. The reluctance of grocery suppliers to disclose commercially sensitive information to the Commission is a significant issue that needs addressing and the current settings deter rather than enable.

4.6 In the Grocery Market study through to the Commission's first annual Grocery Industry report in August 2024, it has been substantiated that suppliers fear that sharing information could result in disclosure, that would jeopardise their relationships with major grocery retailers, potentially leading to adverse business consequences. This hesitation undermines regulatory oversight and transparency, which are crucial for maintaining fair competition and consumer protection.

4.7 To mitigate these concerns, NZFGC believes it is essential to enhance protections for disclosure, ensuring that sensitive information is safeguarded from misuse by competitors or business partners. Strengthening these protections through regulatory changes or discretionary measures by the Commission would encourage disclosures from suppliers, ultimately fostering a more transparent and competitive market environment.

Anonymous Reporting 'Whistleblowing' tool cannot fully protect disclosure as subject to OIA and anti-retaliation protections to enable disclosure

4.8 Expanding on the above points, NZFGC wishes to take the opportunity to draw attention that a crucial and critical disclosure mechanism for highly sensitive information could benefit from further protections. The anonymous reporting whistleblowing tool was set up to encourage suppliers who may be hesitant to provide a secure channel for raising concerns. There are some early signs that this may be a valuable and trusted mechanism under the new grocery regulations, and we understand is enabling the Commission in furthering its monitoring under the Grocery Industry Competition Act (GICA) and the Commerce Act. However, we have had ongoing concerns that the tool is subject to the disclosure requirements of the OIA, and while it may enable people to report cartels without being identified its application in the grocery industry is limited given the nature, functioning, and structure of the grocery market. Specifically, the concentration of market power proves difficult for intervention in specific complaints unless the supplier discloses their identity, or that given the market structure that the information provided in making such disclosures is such that it leads to an inadvertent identification of the supplier's identity.

4.9 These concerns should be given further consideration for the reasons articulated above, whether addressed through this review or through other changes in relation to the functioning of GICA. Increasing confidence for supplier disclosure would improve

the Commission's ability to investigate and take enforcement action in relation to breaches of the Code and other breaches of the Commerce Act.

4.10 To provide further context and background on the issue above, NZFGC advocated during MBIE's consultation process that the Grocery Code should include explicit anti-retaliation protections. For example, that for a period after a supplier raises a dispute or brings a complaint, or the Grocery Commissioner makes a determination in a supplier's favour, the Commission would monitor the conduct of the retailer to observe there is no retaliatory behaviour against that supplier. NZFGC considers that in concert with any changes under this review process that the legislation could be improved by introducing express anti-retaliation protections, including appropriate protections for any confidential information provided to the Commission regarding RGR conduct.

4.11 NZFGC believe suppliers should have a greater degree of protection and control of when their identity in relation to a complaint will be disclosed, and the Commission should be able to act on and investigate complaints without disclosing this information to RGRs.

Strengthening s100 orders and penalties

4.12 As indicated by NZFGC's position above, we support the strengthening s100 orders to tighten access to confidential information and given greater clarity regarding the process for investigations, inquiries (including market study) and assessment of an application for clearance or authorisation. We support enabling the Commission to use section 100 orders to provide restricted access to specified information, subject to terms and conditions. This measure would enhance the Commission's ability and provide greater protections to test confidential information on a restricted basis with designated external parties, such as legal or economic experts. The outcome here should be to ensure the Commission handles sensitive information effectively with confidentiality protections where necessary and ensure thorough and informed decision-making. Further, increasing the maximum penalties so that there is alignment to the s103 penalties makes sense. In strengthening the s100 penalties, we would also support steps to ensure a greater level of trust is obtained in protecting commercially sensitive information.

Issue 11: Minor and technical amendments to Commerce Act

4.13 We have no substantive comments on this issue. However, we support the recommendation that conferences should be enabled so that participation can be better facilitated such as being held online and across multiple dates to clarify the practice in reality. This makes good sense from an engagement perspective in a business-like manner. We would caution however, that such processes, like all processes, need to be timely and would hope to enable the Commission to be more efficient in its processes. The regulatory impact of delays and long investigative processes adds costs and time to transactions, to the detriment of all parties involved.

5. CONCLUSION

In conclusion, NZFGC appreciates the opportunity to provide feedback on the discussion document “Promoting competition in New Zealand - A targeted review of the Commerce Act 1986” and while we have not commented on every issue, our submission reflects our understanding and experience with the Act, particularly in the grocery market. We emphasise the need for a balanced approach that considers both the benefits and potential consequences of regulatory interventions to foster a more transparent, competitive, and fair market environment in New Zealand.