

# Submission Form

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## 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'*

### Release of Information

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

### Privacy statement

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

### Use and release of information

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

If you consider that we should not publish any part of your submission, please indicate which part should not be published, explain why you consider we should not publish that part, and provide a version of your submission that we can publish (if we agree not to publish your full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 If you indicate that part of your submission should not be published, we will discuss with you before deciding whether to not publish that part of your submission.

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

### Personal information

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

### Contacting you about your submission

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

## Viewing or correcting your information

We may share this information with other government agencies, in line with the Privacy Act 2020 or as otherwise required or permitted by law. This information will be securely held by MBIE. Generally, MBIE keeps public submission information for ten years. After that, it will be destroyed in line with MBIE's records retention and disposal policy. You have the right to ask for a copy of any personal information you provided in this submission, and to ask for it to be corrected if you think it is wrong. If you'd like to ask for a copy of your information, or to have it corrected, please contact MBIE by emailing [competition.policy@mbie.govt.nz](mailto:competition.policy@mbie.govt.nz).

## Submission information

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

## Release of information

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

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

I would like my submission (or identified parts of my submission) to be kept confidential because  
[\[Insert text\]](#)

[To check the boxes above: Double click on box, then select 'checked']

Personal details and privacy	
1.	<p>I have read and understand the Privacy Statement above. Please tick Yes if you wish to continue*</p> <p>[To check the boxes below Double click on box, then select 'checked']</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
2.	<p>What is your name?*</p> <p>Vivienne Wilson</p>
3.	<p>Do you consent to your name being published with your submission?*</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>
4.	<p>What is your email address? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
5.	<p>What is your contact number? Please note this will not be published with your submission.*</p> <p>Privacy of natural persons</p>
6.	<p>Are you submitting as an individual or on behalf of an organisation?*</p>

	<input type="checkbox"/> Individual (skip to 8) <input checked="" type="checkbox"/> Organisation
7.	If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation. <input checked="" type="checkbox"/> Yes, I am authorised to make a submission on behalf of my organisation
8.	If you are submitting on behalf of an organisation, what is your organisation's name? Please note this will be published with your submission. Orion New Zealand Limited
9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one. <input type="checkbox"/> Law Firm <input type="checkbox"/> Consumer organization <input type="checkbox"/> Consultancy <input type="checkbox"/> Think-Tank <input type="checkbox"/> Advocacy group <input checked="" type="checkbox"/> Business/Private Firm <input type="checkbox"/> Contractor/SME <input type="checkbox"/> Registered charity <input type="checkbox"/> Non-governmental organisation <input type="checkbox"/> Academic Institution <input type="checkbox"/> Central government <input type="checkbox"/> Iwi, hapū or Māori organisation <input type="checkbox"/> Academic/Research <input type="checkbox"/> Other. Please describe:

## Responses to questions

The Competition Policy team welcomes your feedback on as many sections as you wish to respond to, please note you do not need to answer every question.

Mergers	
Issue 1 – the substantial lessening of competition test	
1.	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.
	No comment.
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.
	No comment.
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.
	No comment.
4.	Should the ‘substantial lessening of competition’ test be amended or clarified, including for: <ul style="list-style-type: none"> <li>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?</li> <li>b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)?</li> <li>c. In relation to just the merger provisions or wherever the test applies in the Commerce Act?</li> </ul> If so, how? Please provide reasons.
	No comment.
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.

	No comment.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	No comment.
<b>Issue 2 – Substantial degree of influence</b>	
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.
	No comment.
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 comment.
<b>Issue 3 – Assets of a business</b>	
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 comment.
10.	<p>If you consider there is a problem, how should the phrase be amended? For example, by:</p> <ul style="list-style-type: none"> <li>a. referring simply to “assets”? or</li> <li>b. should the definition of “assets” in the Commerce Act be further refined?</li> </ul>

	No comment.
<b>Issue 4 – Mergers outside the clearance process</b>	
11.	What are your views on how effectively New Zealand’s voluntary merger regime is working?
	No comment.
12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	No comment.
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.
	No comment.
<b>Issue 5 – Behavioural undertakings</b>	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?

	No comment.
<b>Anticompetitive conduct</b>	
<b>Issue 6 – Facilitating beneficial collaboration</b>	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
	<p>The electricity industry is highly regulated, via multiple regulatory agencies, and being an Electricity Distribution Business (EDB) we are subject to regulation under Part 4 of the Commerce Act 1986. We are a lifeline utility and it is vital we recognise and effectively manage the primary risks associated with our business.</p> <p>Our community's dependence on electricity becomes even more pronounced during High Impact Low Probability (HILP) events such earthquakes. As stated in section 60 of the Civil Defence Emergency Management Act 2002, our status as a crucial lifeline utility mandates that we maintain operational functionality to the greatest extent possible, even if it means operating at a diminished capacity, during and in the aftermath of an emergency. Consequently, we plan for, and hold spares for these types of events.</p> <p>We are subject to the provisions in Part 2 of the Commerce Act 1986 and are conscious of the rules relating to restrictive trade practices. We note the exception that applies to collaborative activity in terms of cartel provision, and the Collaboration and Sustainability Guidelines that have been produced by the Commerce Commission. We also note that the Commerce Commission has issued guidance about business collaboration in response to emergencies.<sup>1</sup></p> <p>We participate in an EDB Sustainability Group which promotes beneficial collaboration between EDBs and we are keen to retain this type of collaboration without any question of breaching the restrictive trade practices provisions in the Commerce Act. The areas where we consider collaboration between EDBs is extremely beneficial include</p> <ul style="list-style-type: none"> <li>• modern slavery risks and prevention,</li> <li>• waste and recycling,</li> <li>• diversity, equity and inclusion initiatives, and</li> <li>• fleet emissions.</li> </ul> <p>We also note that there are other areas where collaboration between EDBs is extremely beneficial. We are currently involved in the development of an industry-standard load management protocol, queueing and management policy (for connections to distribution networks), and other relevant policies to allow EDBs to</p>

<sup>1</sup> [Business-collaboration-in-response-to-an-emergency-Guidance-March-2023.pdf](#)

	<p>offer a consistent service to retailers and other customers. Again we are mindful of the obligations in Part 2 of the Commerce Act in this regard.</p> <p>Furthermore, if there is an emergency we rely on our stocks of equipment and the like, but for very large emergencies, our stocks and supply chains may be tested. We would collaborate with other EDBs in these circumstances, and that was the case for the Cyclone Gabrielle response.</p> <p>Currently, we don't necessarily consider that the application of the Commerce Act has deterred collaborative beneficial arrangements. However, the Act and the approach of the Commerce Commission could do more to encourage such beneficial arrangements by providing more clarity and certainty, and some protection for business that follow the Collaboration and Sustainability Guidelines. For example, in the UK, businesses that follow the principles in the UK Green Guidance will not face UK Competition and Markets Authority (CMA) enforcement action. Those that approach the CMA for informal guidance will receive protection from enforcement and/or fines.<sup>2</sup></p>
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?
	See our comments above.
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
	<p>On page 26, the Discussion Document outlines various possible options. Option 1 is <i>"Make explicit in the Commerce Act that the Commission has a role in issuing guidance"</i>. We note the Discussion Document says that this guidance could be given greater status to assist the courts in interpreting the provisions. We do not have an issue with making explicit in the Commerce Act that the Commission has a role in issuing guidance. However, we do not think it is appropriate for the guidance to be given greater status to assist the courts in interpreting the provisions. It is up to the Courts to interpret the provisions in accordance with the law of statutory interpretation. We do not think there should be a category of guidance that is given a higher status by the Courts.</p> <p>We support option 2 particularly in the subject areas we outlined in our answer to question 15. There are certain areas where it would be appropriate to introduce legal safe harbours so that businesses can take action on such things as climate change and environmental sustainability, and response to emergencies without undue fear of breaching the Commerce Act.</p>

<sup>2</sup> See [Green agreements guidance](#), chapter 7.



	We do not comment on options 3, 4 and 5.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	No comment.
<b>Issue 7 – Anti-competitive concerted practices</b>	
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?
	<p>We are not aware of issues with tacit collusion in relation to EDBs because we are natural monopolies. However, generally it is not clear to us whether the Commerce Act adequately deters forms of ‘tacit collusion’ between firms that is designed to lessen competition between them.</p> <p>We agree that there is an emerging challenge in relation to algorithmic collusion on pricing, and we note that there is some discussion overseas about the risk of algorithmic autonomous tacit collusion.<sup>3</sup> With the emergence of AI, these concerns are only going to grow and will need to be addressed appropriately.</p>
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 agree that concerted practices should be explicitly prohibited. We favour an approach similar to Australia where the Competition and Consumer Act 2010 prohibits a business from engaging with one or more persons in a concerted practice that has the purpose, or is likely to have the effect of substantially lessening competition in a market in Australia. To be a breach of the Act at least one of the persons engaging in a concerted practice must be a corporation and at least 2 of the persons must be separate entities.

<sup>3</sup> See <https://globalcompetitionreview.com/guide/digital-markets-guide/fourth-edition/article/competition-authorities-zero-in-antitrust-risks-of-algorithmic-pricing#:~:text=Algorithms%20facilitating%20explicit%20collusive%20agreements,collusion%20between%20firms%20more%20stable>.

Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	<p>Do you consider that industry codes or rules could either:</p> <ol style="list-style-type: none"> <li>Fill a gap in the competition regulation regime or</li> <li>Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.</li> </ol>
	<p>Codes may be an option to fill a gap in the competition regulation regime. However, the use of codes needs to be thought through very carefully. As we noted in our submission on the Discussion Paper on the Regulatory Standards Bill<sup>4</sup> there can be stress points where there are different regulatory agencies with an overlap of regulatory responsibilities. For example in relation to EDBs, the Commerce Commission has statutory functions under the Commerce Act and is responsible for information disclosure regulation and default/customised price-quality regulation. The Electricity Authority, which is established under the Electricity Industry Act 2010, has its main objective to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers. There can be confusion where these regulatory regimes intersect (often in the Electricity Industry Participation Code 2010), and it can be questionable whether one or both regulatory agencies have consulted with each other and discharged their stewardship responsibilities for the regulatory systems they work within.</p>
22.	<p>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?</p>
	No comment.
23.	<p>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?</p>
	No comment.

<sup>4</sup> See <https://www.oriongroup.co.nz/assets/Our-story/Submissions/Other/Orion-submission-proposed-regulatory-standards-bill-January-2025.pdf>

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
	Yes. Our view is that the injunction powers in the Commerce Act should be updated to allow the court to set performance requirements. There is no point in having out of date powers that do not provide a full suite of remedies for the Courts.
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 comment.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	We are not sure whether the Official Information Act 1980 does strike the right balance. If a person is dissatisfied with a decision of the Commission with respect to an OIA request, then a complaint to the Commission's internal complaints procedure and/or to the Ombudsman may come after disclosure has already occurred. The protection of commercially sensitive information is of the upmost importance and a balancing approach is not necessarily the right approach in all cases.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	We would support strengthening the confidentiality order provisions in section 100 of the Act.
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?

	We support the minor and technical amendments proposed 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?
	No comment.
Any other issues	
30.	Are there any other issues that you would like to raise?
	No comment.
General Comments:	

## Thank you

We appreciate you sharing your thoughts with us. Please find all instructions for how to return this form to us on the first page.