Russell McVeagh

17 February 2025 **By email**

Competition Policy Team
Ministry of Business, Innovation and Employment
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Email: competition.policy@mbie.govt.nz

Dear Competition Policy Team,

SUBMISSION ON MBIE'S CONSULTATION PAPER: PROMOTING COMPETITION IN NEW ZEALAND – A TARGETED REVIEW OF THE COMMERCE ACT 1986

1. We appreciate the opportunity to provide this submission in response to the Ministry of Business, Innovation and Employment's ("**MBIE**") consultation paper on promoting competition in New Zealand through a targeted review of the Commerce Act 1986 ("**Commerce Act**") dated December 2024 ("**Consultation Paper**"). We endorse the joint submission prepared by Russell McVeagh, Chapman Tripp, MinterEllisonRuddWatts, and Webb Henderson and submit this document to address additional and supplementary points on key areas of the Consultation Paper.

2. As an overarching contextual point, we wish to emphasise the following:

   (a) Any proposed changes to the current legislative regime should be proportionate, evidence-based, and justified by clear issues within the existing framework. Legislative amendments should be precisely targeted to address specific concerns and ensure they strengthen, rather than compromise, the regime's overall effectiveness.

   (b) We urge caution against introducing significant changes to the legislative regime. If this review does not identify specific evidence of a legislative problem in New Zealand, implementing major changes – such as modifying the substantial lessening of competition ("**SLC**") test or adopting a cumulative assessment of creeping acquisitions over a three-year period – would be premature.

   (c) The review should also be careful to distinguish between issues that might warrant legislative change and those better addressed through improvements in implementation and regulatory practice. The recently announced independent review of the Commission, as part of MBIE's broader review of competition settings, offers a key opportunity to evaluate the Commission's performance, decision-making processes, and regulatory practices. This review could help identify practical improvements within the existing legislative regime.

(d) In our experience, the legislative fundamentals of the current merger regime under the Commerce Act are sound, and we encourage prioritising non-legislative solutions where possible.

3. In that context, our key submission points on the issues discussed in the Consultation Paper are as follows:

   (a) **A shift to mandatory notification requirements is not justified**: The current voluntary regime allows the Commission to focus on high-risk mergers without imposing unnecessary costs. Mandatory notification, including for designated companies, would increase compliance burdens, deter investment, and strain regulatory resources. In particular, it could disadvantage designated companies in competitive bid processes, distorting capital markets without clear benefits. We are not aware that widespread under-notification is a problem, and as such, a change does not appear to be warranted.

   (b) **Creeping acquisitions are already addressed under the current framework**: The Commission is already able to assess the cumulative impact of acquisitions over a three-year period, enabling it to review both recent and earlier transactions where necessary. We are not aware that the current framework has constrained the Commission's ability to consider creeping acquisitions. Introducing additional legislative provisions would risk creating uncertainty, deterring investment, and capturing benign transactions. Instead, non-legislative measures, such as enhanced Commission guidance and improved monitoring, would more effectively address any concerns while maintaining regulatory certainty.

   (c) **Binding safe harbours and a statutory notification regime would enhance legal certainty and better promote legitimate collaboration**: Defining categories of arrangements that do not breach competition law would reduce compliance burdens and encourage pro-competitive collaboration. A structured exemption framework, similar to the European Union's 'block exemption' model, would provide much-needed clarity.

   (d) **A specific prohibition on concerted practices is unnecessary**: The existing framework already captures and deters illegal anti-competitive coordination through the concept of an "understanding". Introducing a separate prohibition could create uncertainty, regulatory overreach, and compliance risks for legitimate business conduct.

   (e) **Industry codes must be carefully designed and subject to safeguards**: While industry codes can address sector-specific competition concerns, they should be subject to clear statutory criteria, public consultation, and Ministerial approval.

4. In addition to the issues raised in the Consultation Paper, we consider there is scope for the following improvements to the Commerce Act:

(a) **The cartel prohibition's treatment of land covenants should better accommodate legitimate business purposes**: The current prohibition risks capturing necessary commercial covenants in sectors such as energy and retail development. Refinements would ensure legitimate uses are protected while preventing anti-competitive misuse.

(b) **RPM provisions should be assessed under an effects-based framework**: The *per se* prohibition on resale price maintenance ("**RPM**") does not distinguish between harmful and pro-competitive conduct. An effects-based approach would align with international best practices, allowing beneficial arrangements while preserving competition oversight.

(c) **The joint buying exception should be clarified**: The current scope of the joint buying exception is unclear, particularly where incidental market allocation (e.g. dividing supply responsibilities) is necessary for efficiency reasons. This uncertainty may deter legitimate joint purchasing arrangements that enhance competition by reducing costs and improving supply chain efficiency. Providing greater clarity would ensure that pro-competitive collaborations are not inadvertently restricted by the cartel prohibition.

5. We expand on each of these points in the **Appendix** to this letter, aligning with the structure of the Consultation Paper.

6. We welcome any opportunity for further consultation and engagement with MBIE and are available to discuss this submission as needed.

Yours sincerely

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Privacy of natural persons

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APPENDIX

ISSUE 4 – MERGERS OUTSIDE THE CLEARANCE PROCESS

Non-notified mergers

1. We do not consider that non-notified mergers are a significant issue in New Zealand.

2. Several existing pathways effectively bring mergers to the Commission's attention:

   (a) **Voluntary applications and the courtesy letter process**: Many merging parties proactively engage with the Commission through these channels, ensuring that the Commission has good visibility of merger activity. There are strong incentives to voluntarily engage with the Commission when a merger raises potential competition risks, given the significant legal, financial, and reputational risks of proceeding without clearance or authorisation. The informal courtesy letter process is also an effective, non-legislative tool that helps parties manage risk while providing the Commission with visibility over potentially concerning mergers.

   (b) **The Commission's collaboration with the ACCC**: The working relationship between the Commission and the Australian Competition and Consumer Commission ("**ACCC**") allows for information-sharing and coordination on cross-border transactions that may affect the New Zealand market.

   (c) **Oversight by the OIO**: For acquisitions involving foreign direct investment, the Overseas Investment Office's ("**OIO**") process may include consideration of competition issues indirectly through coordination with the Commission. For example, in the *Serato* case, the OIO's approval was contingent on the Commission confirming there were no competition concerns, highlighting the OIO's role in identifying potentially problematic mergers.

3. These mechanisms collectively ensure that the Commission remains informed of many mergers without the need for mandatory notification.

4. Furthermore, the legal, economic, and institutional landscape in New Zealand differs significantly from jurisdictions like the United States and Europe, where mandatory notification is required. These jurisdictions handle a much larger volume of mergers and have significantly greater regulatory resources. Importing such a system into New Zealand would likely impose disproportionate burdens on businesses and regulators without providing significant additional benefits to competition oversight.

5. We consider that increasing Commission oversight to mitigate concerns about under-intervention risks creating inefficiencies by diverting resources to low-risk mergers instead of transactions raising genuine competition concerns. Even under the current regime, we have observed that the timeframes for Commission clearance processes have been increasing. Further legislative changes expanding the Commission's role are likely to exacerbate delays, discouraging engagement and undermining the Government's goal of making New Zealand an attractive place to invest and do business.

Mandatory notification power for designated companies

6. We oppose this option. A mandatory notification power for designated companies would undermine the current voluntary regime, which generally functions well by allowing the Commission to focus on high-risk mergers without imposing unnecessary costs. A mandatory regime, including one reserved just for designated companies, would be overly burdensome and inefficient, stretching the Commission's limited resources.

7. Additionally, the reverse onus of proof in New Zealand's competition law could lead to more situations where the Commission blocks mergers that might otherwise be approved by the courts. Requiring all mergers involving designated companies to be reviewed could result in excessive intervention and missed opportunities for legitimate, beneficial transactions.

8. The practical implementation of this option would also be challenging. Defining which companies are designated could be complex and contentious. Furthermore, introducing different rules for specific companies undermines the principle of "one law for all", creating an uneven playing field in the market. This would distort capital markets and M&A activity, particularly if a designated company is placed at a competitive disadvantage during a bid process merely due to its designation, despite no competition risks being present. If this option is pursued, a thorough cost-benefit analysis should be carefully designed to minimise potential adverse impacts on capital markets, competitive bid processes, and broader investment decisions.

Creeping acquisitions

9. We do not consider the current test under the Commerce Act prevents the Commission from addressing cumulative acquisitions that substantially lessen competition. We are unaware of any instance where the Commission considered itself constrained in assessing the competitive effects of a series of acquisitions. This is likely because the Commission can investigate mergers within three years of completion. If multiple "bolt-on" transactions occur within that period, the Commission can review both the latest and earlier transactions, provided they fall within the three-year timeframe.

10. It should be recognised that amendments targeting creeping acquisitions could increase uncertainty and deter investment. This could undermine the Government's goal of making New Zealand an attractive investment destination. We consider that non-legislative measures, such as enhanced Commission guidance or improved monitoring, could be prioritised to address any concerns within the existing framework.

11. However, if further clarity is sought, alignment with Australia's approach and thresholds would be preferable. If adopted, clear guidance should be provided on:

    (a) The criteria for determining when acquisitions form part of a series;

    (b) Thresholds for identifying when cumulative effects raise competition concerns; and

    (c) Whether exemptions or exclusions apply to certain types of acquisitions.

Entrenchment of market power

12. We consider the current framework, including case law, already sufficiently addresses the entrenchment of existing market power under the SLC test. Further amendments are not necessary, as the test is well understood with reference to existing case law.

13. That said, any proposed changes must be carefully designed to avoid inadvertently preventing pro-competitive or competitively neutral mergers that foster innovation or benefit consumers. For example, the acquisition of small or nascent competitors by larger players should not be automatically assumed to harm competition unless there is a demonstrable risk of a SLC. This is particularly the case in dynamic markets, such as technology sectors, where acquisitions of small, innovative firms often drive innovation and product development. In this respect, we would be concerned if amendments to the SLC test were made for the purpose of reflecting the existing legal position under case law, but this was construed by the courts as requiring a different (stricter) approach. Our preference is therefore to retain the existing SLC test and apply this with reference to the case law, as per the status quo.

ISSUE 6 – FACILITATING BENEFICIAL COLLABORATION

14. We consider that uncertainty in the application of the Commerce Act may be having the effect of discouraging businesses from engaging in beneficial collaborations, particularly as non-compliance risks are significant. Key areas of concern include:

    (a) **The collaborative activities exception**: The collaborative activities exception is an important feature of the Commerce Act as it recognises that competitor collaborations are, in some cases, pro-competitive (or at least neutral from a competition perspective) and should not be subject to the strict *per se* cartel prohibition. The exception has not been subject to judicial scrutiny since its introduction in 2017, and the Commission has only considered and decided upon one collaborative activities clearance application. While this is not itself indicative of a problem with the current exception, our experience indicates that a lack of judicial and regulatory guidance can leave businesses uncertain about the threshold for meeting key criteria, particularly what constitutes a "collaborative activity" and when conduct is deemed "reasonably necessary" to achieve the collaboration’s purpose.

    (b) **The vertical supply contract exception**: The purpose of the exception is to recognise that there are legitimate pro-competitive efficiency-enhancing reasons for the use of a technical "cartel provision" in a vertical supply relationship. However, the current drafting of the exception materially reduces the effectiveness of the exception and therefore the confidence that parties can have in relying on it. In particular:

        (i) It only applies where the technical "cartel provision" "relates to the supply or likely supply of goods or services to the customer or likely customer", which the Commission interprets narrowly. As a result, restrictions extending beyond the immediate supply arrangement, such as conditions on downstream product use or provisions tied to sustainability or operational efficiencies, may fall outside its scope. This creates challenges for businesses in supply relationships with legitimate objectives like supply chain efficiency, emissions reduction, or innovation, as they may struggle to qualify under the exception.

(ii) It only applies where the dominant purpose of the technical "cartel provision" itself (as opposed to the dominant purpose of the broader supply relationship) is not to "lessen competition" between the parties. This narrow focus means that parties who can objectively demonstrate that the technical "cartel provision" is reasonably necessary for the success of the vertical relationship may not be able to benefit from the exception due to the risk of the Commission adopting a narrow interpretation of one clause's "dominant purpose" that is taken out of the context of the broader commercial relationship. This is not a theoretical concern. We are aware of parties who have decided not to supply third parties due to being unable to get comfortable with the legal risk of the Commission adopting a narrow interpretation and the parties facing accusations of cartel conduct. We would recommend that this limb be replaced with an assessment of whether the technical "cartel provision" is reasonably necessary for the purpose of the vertical supply agreement, which would mirror the approach taken to collaborative activities.

(c) **The joint buying and promotion exception**: The joint buying and promotion exception is limited to agreements fixing the price at which goods or services will be collectively acquired or resold, excluding broader collaborative efforts such as joint purchasing arrangements involving non-pricing aspects like shared logistics, promotional coordination, or joint marketing. As a result, businesses pursuing operational efficiencies or cost reductions beyond price coordination may face legal risk, even when their collaboration is legitimate and pro-competitive.

(d) **Sustainability collaborations**: In sustainability-focused arrangements, it is unclear whether agreements primarily aimed at sustainability, rather than profit or market share, should be *per se* anti-competitive or assessed solely under the SLC test. While the collaborative activity exemption may apply, uncertainty and high stakes make businesses overly cautious. Moreover, clearance or authorisation is often impractical due to the associated time and cost burdens.

15. As a result, businesses may be deterred from forming potentially beneficial collaborations due to unclear boundaries and the risk of regulatory scrutiny.

16. We consider that legislative reform, such as clarifying the vertical supply and joint buying exceptions and granting the Commission powers to characterise certain arrangements as unproblematic (whether in advance or subject to a streamlined notification procedure), could reduce legal uncertainty and its impact on innovation and policy goals. Greater clarity on these exceptions would empower businesses to pursue legitimate collaborations with confidence, fostering pro-competitive innovation and sustainability while mitigating regulatory risk.

Binding safe harbours

17. Binding safe harbours or 'block exemptions' would offer greater commercial certainty by clearly defining categories of arrangements that do not breach competition law. Businesses could confidently structure collaborations without the risk of inadvertently engaging in prohibited conduct, reducing the need for individual clearances, lowering compliance costs and, importantly, being able to respond quickly and efficiently to opportunities for beneficial collaboration.

18. The European Union's approach offers a useful model. The European Commission issues Block Exemption Regulations ("**BERs**") pursuant to its powers under Council Regulation (EC) No 19/65, which authorises the European Commission to specify categories of agreements, such as joint R&D or distribution arrangements, that are presumed to satisfy the exemption criteria under Article 101(3) TFEU and are therefore exempted from the prohibition of restrictive agreements under Article 101(1) TFEU. These regulations establish "safe harbours" by setting out detailed conditions tailored to particular types of agreements, including market share thresholds and particular types of provisions that disqualify the application of the block exemption, allowing qualifying agreements to benefit from a presumption of legality. While BERs provide legal certainty, businesses must still conduct careful self-assessments to ensure that their agreements meet the specified criteria. Moreover, competition authorities retain the ability to keep exemptions under review and can amend or disapply them for particular types of provisions moving forward (i.e. not retrospectively) if necessary, ensuring ongoing oversight and adaptability.

19. Adopting a similar approach in New Zealand, with exemptions tailored to local market conditions and reviewed regularly, could help mitigate legal uncertainty. However, procedural safeguards – such as public consultations and clear eligibility requirements – are important to ensure transparency and predictability. Furthermore, it should not be the case that the introduction of safe harbours renders collaborations outside these exemptions presumptively illegal, which would exacerbate any chilling effect on beneficial collaborations.

Statutory notification regime

20. A voluntary statutory notification regime could provide businesses with a simpler and faster path to legal certainty than the formal collaborative activities clearance process. Drawing on the ACCC model, this regime could allow businesses to submit streamlined notifications for specific collaborative arrangements and receive feedback on potential risks.

21. While the collaborative activities exception already permits some collaborations, the notification regime should focus on grey-area conduct (e.g. joint sustainability initiatives) that may otherwise be interpreted as cartel conduct. To be effective, the regime would require clear guidelines on:

(a) When a notification is appropriate;

(b) The types of conduct eligible for notification; and

(c) How businesses can rely on a positive notification response to avoid further regulatory action.

22. The regime should avoid duplicating existing processes and instead streamline legal certainty for arrangements that may not fit squarely within the collaborative activities exception.

Binding guidance

23. A key design feature of any regulatory solution should be the Commission's ability to issue guidance on how it will apply the Commerce Act in specific scenarios. Binding guidance that prevents the Commission from taking enforcement action contrary to its guidance would, on the one hand, provide businesses with much-needed legal certainty and protection against enforcement risks, fostering pro-competitive collaborations. The usefulness of the Commission's current non-binding guidelines was questioned as a result of the Court of Appeal's decision in *NZME Ltd v Commerce Commission* [2018] NZCA 389, where it was held that the Commission may depart from its own guidance. Businesses cannot rely on the guidelines as definitive indicators of compliance, limiting their usefulness as a practical tool for navigating the Commerce Act.

24. The Commission should have the authority to declare activities compliant with the Commerce Act but should not have the unilateral power to declare activities illegal outside established enforcement processes. This limitation would preserve procedural fairness and protect businesses from potential overreach. However, this ability may more appropriately rest with the Commission in the context of developing safe harbours, rather than introducing the concept of binding guidance. Such an approach would still offer:

(a) **Legal certainty**: By clarifying ambiguous areas of the Commerce Act, businesses can proceed with confidence.

(b) **Encouragement of collaboration**: Reduced enforcement risk would encourage collaborations that generate innovation and public benefits.

(c) **Efficient use of resources**: Providing businesses with a streamlined path to legal certainty would minimise reliance on costly legal advice and reduce the need for formal clearance applications.

ISSUE 7 – ANTI-COMPETITIVE CONCERTED PRACTICES

25. We do not consider the introduction of a specific prohibition on concerted practices necessary.

26. The existing concept of an "understanding" under the Commerce Act is sufficient to capture concerted practices. This legal test sets a low threshold for determining when anti-competitive behaviour is prohibited. This standard is broader than in comparable jurisdictions, ensuring that most forms of harmful coordination are already captured. The flexibility of the current framework allows the Commission to address anti-competitive coordination without additional regulation.

27. Therefore, we also do not see a significant gap in the current framework warranting further regulatory intervention. Our impression is that the current test already acts as an

effective deterrent to tacit collusion given, based on New Zealand's case law, there is unlikely to be any material difference between tacit collusion and an 'understanding'. As tacit collusion is closely tied to market dynamics, a regulatory focus on market structure issues, such as promoting competitive market conditions through merger control and market studies, should be preferred, rather than the introduction of ex-post enforcement tools that risk deterring legitimate conduct. Efforts should prioritise monitoring market behaviour and ensuring competitive structures, rather than expanding regulation that risks deterring legitimate business conduct.

28. Additionally, a key challenge with introducing a separate concerted practices prohibition is defining the scope of the conduct in a way that targets anti-competitive behaviour without capturing legitimate competitive practices. If the prohibition is not carefully defined, it could result in regulatory overreach and uncertainty for businesses. In particular, introducing a broad prohibition without adequate safeguards could inadvertently capture conduct that is pro-competitive or neutral. For example, interactions in industry associations or joint ventures could be misinterpreted as concerted practices, creating compliance burdens and discouraging legitimate collaboration.

ISSUE 8 – INDUSTRY CODES OR RULES

29. Industry codes or rules have the potential to fill gaps in the competition regulation regime and address sector-specific competition issues more efficiently than developing new primary legislation. Given that they are already used under sector-specific legislative provisions, we see the question more about whether there should be a general statutory power to allow codes or rules to be made for any sector that warrants intervention, rather than whether they should be used at all.

30. If clear legislative criteria and processes govern the development and implementation of codes or rules, then consideration of whether intervention is justified should be equally (if not more) robust than developing primary legislation. Key features should include a statutory test that requires the Commission to establish that competition will be promoted and the benefits for consumers will exceed the costs, public consultation, and a recommendation to Ministers for approval (with the Minister having the power to reject, approve or send back for further work and amendment).

31. The following principles should guide their development:

(a) **Targeted application**: The empowering provisions should establish a clear threshold for when the Commission can consider enacting an industry code to address competition concerns. The threshold should require evidence that the code would:

(i) promote competition within the relevant sector;

(ii) address specific and identifiable competition issues that cannot be adequately resolved through existing mechanisms; and

(iii) provide net benefits to consumers (e.g. the benefits of intervention will exceed the costs).

(b) **Consultation and transparency**: Developing industry codes should involve meaningful consultation with stakeholders to ensure they are fit for purpose and avoid unintended consequences. Specifically, the empowering provisions should include requirements for:

(i) clear and timely public notice of the process to develop the code. This notice should outline the scope, objectives, and timeline, ensuring all stakeholders are informed and able to participate from the outset;

(ii) consultation with interested parties, including businesses, consumers, and industry representatives, to ensure the proposed code is fit for purpose;

(iii) publication of a draft code to allow stakeholders to review and assess its potential impact; and

(iv) opportunities to provide submissions on the draft code, with the Commission required to consider and respond to these submissions before finalising the code.

(c) **Approval process**: Ministerial approval should be required before the Commission is permitted to draft or implement an industry code.

(d) **Regular review**: Industry codes should be subject to periodic review to ensure they remain effective and relevant as market conditions evolve.

32. The class of matters or rules included in industry codes will vary depending on the specific competition concerns faced by different sectors. In some cases, the focus might be on transparency of information, in others it might be general conduct of suppliers, and in others there might be specific rules to address identified issues or risk. A clear statutory framework, robust consultation, and regular review will ensure they effectively promote competition without unnecessary regulatory burdens.

ISSUE 10 – PROTECTING CONFIDENTIAL INFORMATION

33. We support maintaining robust confidentiality practices, as they are essential for effective enforcement and decision-making. Businesses are more likely to provide detailed and comprehensive information when assured of its protection. Strengthening confidentiality safeguards, particularly in the context of investigations, will help preserve commercial sensitivity while ensuring the Commission can access the information necessary to assess competition concerns effectively.

34. The Commission generally manages the balance between protecting commercially sensitive information and meeting its transparency obligations effectively. However, we note that the often lengthy and burdensome process of responding to the Commission's information requests can impose significant administrative and financial challenges for businesses, particularly when dealing with commercially sensitive material that requires careful handling and review. To address these concerns, we recommend considering potential adjustments to current settings to support a more efficient information request framework.

35. Potential adjustments could include:

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(a) **Clear and narrowly tailored requests**: The Commission could be encouraged, through refined statutory guidance, to issue information requests that are specific, clear, and narrowly focused on the information necessary for the investigation. This would help reduce the time and effort required for businesses to respond.

(b) **Timely engagement and dialogue**: Consideration could be given to incorporating a requirement for early and ongoing engagement between the Commission and businesses to clarify the scope of requests, resolve ambiguities, and agree on reasonable deadlines for submissions. This would provide flexibility while ensuring requests remain manageable and aligned with business realities.

(c) **Use of secure digital mechanisms**: The Commission could be encouraged to adopt and enhance the use of secure digital tools, such as encrypted portals, to facilitate the safe and efficient transmission of sensitive information. Consideration of formalising these mechanisms within the statutory framework could provide additional clarity and confidence for businesses.

(d) **Safeguards for commercially sensitive information**: Adjustments to the empowering provisions could introduce or clarify processes for handling commercially sensitive information, such as allowing businesses to request confidentiality protections or redactions where appropriate, ensuring that sensitive materials are handled securely and fairly.

(e) **Establishment of an independent Hearing Officer**: The introduction of an independent Hearing Officer, similar to the European Union model, could provide businesses with a neutral avenue to raise concerns about procedural issues. This officer, independent from the substantive investigation team, could serve as an arbiter on matters such as unreasonable requests, timing, access to information, and confidentiality disputes, ensuring greater procedural fairness and mitigating undue burdens on businesses.

Publishing clearance applications

36. We also note that the requirement to publish clearance applications on the Commission's website, including detailed information about the proposed transaction, can be a barrier for some merger parties – particularly international applicants – from engaging with the Commission. The level of detail disclosed in New Zealand is greater than in many other jurisdictions, raising concerns about the potential public exposure of sensitive commercial information and creating hesitation around formal applications.

37. To address this concern, we recommend that the Commission consider refining its publication practices to disclose only the information necessary to meet its transparency obligations. In the European Union, for example, the European Commission typically publishes only a high-level executive summary of decisions, ensuring that commercially sensitive details remain protected while still maintaining public transparency. Adopting a similar approach would help mitigate applicant concerns, safeguard confidential information, and align New Zealand's framework with international best practice.

ISSUE 11 – MINOR AND TECHNICAL AMENDMENTS TO THE COMMERCE ACT

38. The following paragraphs set out our views on the Commission's proposed minor and technical amendments to the Commerce Act.

Sections 65A-D: expanding the Commission's discretion in granting collaborative activity clearances

39. We support the introduction of provisions enabling the Commission to exercise greater discretion in granting collaborative activity clearances. Providing the Commission with the ability to grant clearance for activities that may not be strictly necessary for collaboration but deliver broader public benefits would encourage more socially and economically valuable initiatives.

40. We agree that the Commission should only grant clearance where the collaborative activity does not have the purpose, effect, or likely effect of SLC. Requiring this assessment ensures an appropriate balance between fostering beneficial collaboration and protecting competitive markets. Without this safeguard, the Commission could be required to grant clearance under one section of the Commerce Act for an activity it considers breaches another, creating regulatory inconsistency and sending confusing signals to businesses about their compliance obligations. Expanding the Commission's discretion in this way ensures that clearances are granted only when consistent with the broader objectives of the Commerce Act and do not inadvertently permit anti-competitive conduct.

Section 98A(1)-(2): updating the terminology for search powers

41. We support the amendment of section 98A(1)-(2) to align with the more modern reference to "place, vehicle or thing", as used in the Search and Surveillance Act 2021. This update enhances consistency across legislation and reflects contemporary drafting practices.

Sections 62(6) and 69B: allowing conferences to be held online or over multiple dates

42. We support amending sections 62(6) and 69B to clarify that conferences can be held online and across multiple dates. This amendment acknowledges the realities of modern business practices and the growing reliance on virtual communication. Allowing for flexible conference arrangements will improve efficiency and accessibility.

Section 102: expanding the Commission's ability to serve notices via court directions

43. We do not support amending section 102 to include the power to serve notices in accordance with a court's directions or to apply for such directions. This proposal is unnecessarily broad and could impose additional burdens on businesses.

44. The current provisions already allow the Commission to serve notices digitally, such as via email, which is sufficient given the shift towards digital business operations and remote work. Extending this power to include service through social media or other unconventional means could introduce uncertainty and complexity in enforcement processes without significant benefit.

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OTHER RECOMMENDATIONS

45. We wish to highlight three additional issues that we consider significant and deserving of further consideration in the review of the Commerce Act:

Allowing for the enforceability of covenants that have a legitimate business justification

46. We recommend introducing a new exception to section 30 of the Commerce Act to allow for the enforceability of covenants that have a legitimate business justification and do not have the dominant purpose of lessening competition. Importantly, this exception would not preclude such covenants from being subject to an effects-based assessment under section 28, ensuring that covenants that have an actual impact on competition remain prohibited.

47. For example, wind farms may require covenants on nearby land to ensure sufficient wind flow for power generation. Such covenants are essential for the proper functioning of the wind farm and could not possibly harm competition, as the relevant market is national in scope, with ample alternative locations available for other wind farms. However, under the current framework, these covenants could be prohibited by section 30 if perceived as restricting output, even though they serve a legitimate and efficiency-enhancing purpose.

48. Accordingly, we propose the introduction of a new exception to section 30 to provide a clear framework for covenants that:

    (a) Have a legitimate business justification;

    (b) Do not have the dominant purpose of lessening competition; and

    (c) Are reasonably necessary to achieve the legitimate purpose.

49. This would enable covenants with legitimate purposes while preserving the core objective of section 30 to protect competition. At the same time, the ongoing application of section 28 ensures a balanced regulatory framework that does not unnecessarily discourage efficiency-enhancing business practices.

Joint buying arrangements and the market allocation prohibition

50. We submit that the current scope of the joint buying and promotion exception under section 33 of the Commerce Act could be refined to provide greater legal certainty. As it stands, the exception does not protect joint buying arrangements from the market allocation prohibition, creating uncertainty where agreements involve the allocation of supply responsibilities (e.g. dividing regions or customer groups). Without protection, businesses face compliance risks and potential enforcement, even where the allocation is incidental to achieving pro-competitive outcomes such as cost efficiencies or improved logistics.

51. We recommend that section 33 be amended to explicitly permit market allocation provisions that are ancillary to and necessary for achieving the joint buying arrangement's purpose, subject to safeguards to prevent anti-competitive harm. Alternatively, the Commission could provide clear guidance on the circumstances under which such

arrangements would be permissible. These changes would provide businesses with the certainty needed to confidently pursue beneficial collaborations while ensuring that competition law objectives are maintained.

Resale price maintenance and need for reform

52. The current prohibition on RPM under section 37 of the Commerce Act imposes undue constraints and fails to reflect modern economic principles. RPM is not inherently harmful and, in many cases, can deliver pro-competitive benefits such as preventing 'free-riding', preserving brand value, and incentivising retailer services. In practice, businesses often bypass the prohibition through mechanisms such as agency models or indirect pricing controls, which contributes to legal uncertainty and increased compliance costs.

53. We propose repealing the RPM prohibition and instead assessing such conduct under the SLC test, allowing for a more nuanced, effects-based approach that distinguishes between harmful and pro-competitive practices. Alternatively, we suggest introducing a carve-out that permits RPM within vertical supply agreements where the dominant purpose is not to lessen competition between the parties, and the agreement would otherwise meet the criteria of the vertical supply exception. Such a change would prevent rigid prohibitions from obstructing legitimate business agreements.

54. By adopting a more flexible framework, New Zealand would align with international trends. In the European Union, recent case law, including the *Super Bock Bebidas* (Case C-211/22) ruling by the European Court of Justice, has clarified that while RPM remains a "hardcore restriction" under Article 101(1) TFEU, it does not automatically constitute a restriction "by object". Instead, competition authorities must assess whether the agreement presents a sufficient degree of harm to competition, taking into account its objectives, content, and the economic and legal context. In the United States, the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) moved RPM from a *per se* illegal category to being assessed under the "rule of reason", balancing pro-competitive benefits against anti-competitive harms. Such reform in New Zealand could reduce compliance burdens, promote legitimate business strategies, and ensure regulatory efforts remain focused on genuinely harmful conduct.