

Submission Form

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'*

We welcome your feedback

This is the Submission Form for responding to the Discussion Paper released by the Competition Policy team at Ministry of Business, Innovation and Employment (MBIE) *'Promoting competition in New Zealand – A targeted review of the Commerce Act'*. The Ministry of Business, Innovation and Employment welcomes your comments by **5pm 7 February 2025**

Please make your submission as follows:

1. Please see the full Discussion Paper to help you have your say. There is also a summary version.
2. Please read the privacy statement and fill out your details under the 'Submission information' section.
3. Please fill out your responses to the questions in the tables provided. Your submission may respond to any or all of the questions. Questions which we require you to answer are indicated with an asterisk (*). Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples. If you would like to make other comments not covered by the questions, please provide these in the 'General Comments' section at the end of the form.
4. If your submission contains any confidential information, please:
 - a. State this in the cover page and/or in the e-mail accompanying your submission.
 - b. Indicate this on the front of your submission (eg, the first page header may state "In Confidence").
 - c. Clearly mark all confidential information within the text of your submission.
 - d. Set out clearly which parts you consider should be withheld and the grounds under the Official Information Act 1982 (OIA) that you believe apply.
 - e. Provide an alternative version of your submission with confidential information removed in both Word and as a PDF, suitable for publication by MBIE.
5. Before sending your submission please delete this first page of instructions.
6. Submit your submission by:
 - a. Emailing this form as both a Microsoft Word and PDF document to the Competition Policy team at competition.policy@mbie.govt.nz; or
 - b. Posting your submission to:
Competition Policy team
Ministry of Business, Innovation and Employment
15 Stout Street
PO Box 1473
Wellington 6140

Please direct any questions that you have in relation to the submissions process to competition.policy@mbie.govt.nz.

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. 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. 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.

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

9.

If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.

- Law Firm
- Consumer organization
- Consultancy
- Think-Tank
- Advocacy group
- Business/Private Firm
- Contractor/SME
- Registered charity
- Non-governmental organisation
- Academic Institution
- Central government
- Iwi, hapū or Māori organisation
- Academic/Research
- 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.	<p>What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.</p>
2.	<p>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.</p>
3.	<p>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.</p>
4.	<p>Should the ‘substantial lessening of competition’ test be amended or clarified, including for:</p> <ol style="list-style-type: none"> 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? Entrenchment of market power (e.g. including acquisitions relating to small or nascent competitors)? In relation to just the merger provisions or wherever the test applies in the Commerce Act? <p>If so, how? Please provide reasons.</p>
	<p>We support well-reasoned legislative clarification as this increases transparency, improves access to advice (as a broader range of practitioners can advise on the application of the legislation), and empowers business to operate with certainty.</p>
5.	<p>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</p>

	example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
Issue 2 – Substantial degree of influence	
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.
8.	Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess substantial degree of influence ? If so, how should it be amended? Please provide reasons.
	<p>Yes, the Commerce Act should be amended to provide clearer criteria for assessing a substantial degree of influence. The current test under section 47 is overly broad, leading to uncertainty for those attempting to navigate mergers.</p> <p>Key points and suggestions for clarification include:</p> <p>Control over decision-making: the ability to influence board decisions, veto strategic policies, or direct operational budgets.</p> <p>Agreements: the scope of agreements that may enable one entity to influence another’s activities.</p> <p>Voting Rights/Shareholding Structure: Clarify how voting rights and shareholding impact substantial influence, especially in cases involving interconnected entities.</p> <p>Governance links: Assess the presence of overlapping directors or director appointment rights, which enables control or influence.</p>
Issue 3 – Assets of a business	
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?

	<p>Yes, we see the term “assets of a business” to be unclear. The definition as it stands also narrows the application of the merger review provisions in the Act.</p> <p>In our opinion, all asset acquisitions should be potentially subject to section 47, in turn providing clarity of how/where asset acquisitions are dealt with under the Act. This would ensure:</p> <p>Equal Treatment. Asset acquisitions are treated uniformly, whether the assets are part of an existing business or not (i.e. undeveloped land or certain regulatory rights). The competitive impact of acquiring ‘non-business assets’ can still be significant regardless of their current use.</p> <p>Consistent Testing. Asset acquisitions are assessed solely under the section 47 test (rather than that of section 27). This would mean that prohibitions are only applied where the asset acquisition would, or is likely to, substantially lessen competition. Unlike under s 27, where asset acquisitions would be subject to the ‘anti-competitive purpose’ consideration.</p>
10.	<p>If you consider there is a problem, how should the phrase be amended? For example, by:</p> <ol style="list-style-type: none"> a. referring simply to “assets”? or b. should the definition of “assets” in the Commerce Act be further refined?
	<p>a. Referred to simply as “assets” (per above).</p>
<p>Issue 4 – Mergers outside the clearance process</p>	
11.	<p>What are your views on how effectively New Zealand’s voluntary merger regime is working?</p>
12.	<p>Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.</p>

13.	<p>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:</p> <ol style="list-style-type: none"> a. A stay and/or hold separate power b. A call-in power c. A mandatory notification power for designated companies.
Issue 5 – Behavioural undertakings	
14.	<p>Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?</p>
	<p>We tend to agree that the benefits of providing a power for the Commission to accept behavioural undertakings would likely be outweighed by the costs and complexity this would introduce. We also agree that behavioural undertakings are unlikely to be sufficient over time to mitigate an otherwise anti-competitive merger.</p>
Anticompetitive conduct	
Issue 6 – Facilitating beneficial collaboration	
15.	<p>Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.</p>
	<p>The breadth of the potential application of the cartel provisions, the associated penalties, and how they are applied does, in our experience, cause a chilling effect on arrangements that appear to us to be beneficial or at least not harmful to New Zealand businesses or consumers. The current application of the cartel provisions disincentivise collaboration where businesses are well advised or otherwise well</p>

	<p>educated on the risks arising under the Commerce Act. In particular, the breadth of the restricting output limb, the lack of certainty over the availability of exceptions, and the complete absence of express 'safe harbour' or 'de minimis' behaviour contribute to this chilling effect.</p>
16.	<p>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?</p>
	<p>We believe the introduction of further clarity to allow classes of beneficial collaborations (which may include safe harbour activities or de minimis thresholds for conduct) would be highly beneficial, particularly to small-to-medium sized enterprises and New Zealand's innovation sector, when seeking to engage in collaborative activities.</p>
17.	<p>What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?</p>
	<p>We support all of the mitigation options outlined in this paper.</p> <p>We support both the 'binding guidance' and 'statutory notification regime for specified classes of arrangements' outlined in the discussion paper. The ACCC's notification process for certain types of collective bargaining arrangements and highlights that the ACCC has issued a class exemption for small businesses to collectively bargain. A similar class exemption would be beneficial in New Zealand, as it would eliminate the need for costly/time consuming authorisation applications for collective bargaining arrangements.</p> <p>Ensuring the Commerce Commission has a role in issuing guidance on interpreting the provisions of the Commerce Act would provide much-needed clarity and certainty for businesses, particularly those which are uncertain of both cost and prospects of success. This would help with leading to greater confidence in the application of the Act, and promoting beneficial collaboration.</p> <p>The Statutory Notification which shifts burden of proof to the Commerce Commission would also promote beneficial collaboration and efficiency without the risk of delays. In particular, smaller businesses who might otherwise be deterred by the complexities of authorisation.</p> <p>It is, at present, difficult for smaller businesses to access Commerce Commission processes due to not only fees, but the cost of specialist legal advice which is often required to best participate. In addition to considering waiving fees payable for authorisations, the Commission should consider whether it can introduce simplified or streamlined processes for simple or de minimis issues as well as where small businesses are involved.</p>

18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
Issue 7 – Anti-competitive concerted practices	
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>The Commerce Act does deter tacit collusion, as described in the discussion paper, but there is ambiguity surrounding information-sharing arrangements between competitors.</p> <p>Clear and updated guidance from the Commerce Commission would be welcomed about what types of pricing information exchanges might substantially lessen competition under section 27 or constitute an arrangement to control or maintain prices in violation of section 30.</p>
20.	Should ‘concerted practices’ (e.g., 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?
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"> a. Fill a gap in the competition regulation regime or b. Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons.

	<p>We would welcome industry codes or rules in a smaller market such as New Zealand's as these are well suited to sectors (or segments within sectors) where there is a natural lack of robust competition for reasons unrelated to anti-competitive conduct. For example, we have observed at an anecdotal level that in the New Zealand primary produce sector there may, times, be a lack of competition at different points in a supply chain or value chain due to geographical isolation or lack of business or population density. In these circumstances, an industry code or set of access rules could be an effective means of ensuring participants have fair access to key infrastructure or service providers, on fair terms.</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>
	<p>We largely favour the use of industry codes or rules to ensure access to key services on an equitable basis where there is a natural lack of competition.</p>
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>
<p>Issue 9 – Modernising court injunction powers</p>	
24.	<p>Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons</p>
<p>Issue 10 – Protecting confidential information</p>	
25.	<p>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.</p>

26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
27.	What are your views on strengthening the confidentiality order provisions in s 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?
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand’s competition law?
Any other issues	
30.	Are there any other issues that you would like to raise?

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.