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'*

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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.

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2.	What is your name?* Simpson Grierson (James Craig and Henry King)
3.	Do you consent to your name being published with your submission?* ☒ Yes ☐ No
4.	What is your email address? Please note this will not be published with your submission.* Privacy of natural persons
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6.	Are you submitting as an individual or on behalf of an organisation?* ☐ Individual (skip to 8) ☒ Organisation
7.	If on behalf of an organisation, we require confirmation you are authorised to make a submission on behalf of this organisation. ☒ 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.
	Simpson Grierson
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.	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.
	In our view, the current voluntary merger regime generally works well for NZ purposes – with the Commerce Commission's (**NZCC's**) surveillance programme effective at picking up non-notified mergers. For example, Alderson Logistics and Alpha Theta/Serato are two matters in the last three years which the NZCC picked up in surveillance and successfully filed proceedings (in the case of Alderson Logistics) or declined clearance (in the case of Alpha Theta). Taking action against non-notified mergers has also been a priority of the NZCC in recent years, as evidenced by the matters discussed above, as well as successful judgments obtained by the NZCC against Objective Corporation in 2022 for its acquisition of Master Business Systems ($1.54 million penalty), First Gas in 2019 for its acquisition of GasNet ($3.4 million penalty), and the settlement with Wilson Parking in 2020 for its acquisition of a car park operating lease (divestment of two car park operating leases, as well as contribution to costs). We discuss the effectiveness of the NZCC's monitoring and enforcement of non-notified acquisitions further in Questions 6 and 11 below. That said, two limitations with the current regime in our experience relate to: • The NZCC's ability to accept undertakings from merger parties to resolve competition concerns. Primarily, the NZCC's inability to accept behavioural undertakings sets it apart from a number of other overseas competition regulators, and raises issues particularly in the case of global mergers that include New Zealand where behavioural undertakings are offered to, and accepted by, other overseas regulators. The result of this in a global merger context is that the New Zealand subsidiary may need to be divested to a third party which may not be as beneficial for competition and consumers as if behavioural undertakings could be accepted (i.e. the divested business would not have access to the expertise from the rest of the business if sold off). • The interaction between the Commerce Act and the Official Information Act in relation to the management of confidential and/or commercially sensitive information obtained by the NZCC during an investigation. The risk of disclosure of such information to third parties (which may include competitors) in response to Official Information Act requests is impacting on the ability of parties to provide such information to the NZCC – in circumstances where it is in the public interest that the NZCC has all relevant information before it.

	Further information on these limitations is provided in the submission below.
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.
	We note that only two merger clearance applications have been blocked by the NZCC in the last five years, both of these in the last 12 months – involving Foodstuffs (Commerce Commission - Foodstuffs North Island Limited and Foodstuffs South Island Limited) and AlphaTheta (Commerce Commission - AlphaTheta Corporation, Serato Audio Research Limited respectively). We consider it would be worthwhile for the NZCC in due course (and once any appeals have been concluded) to carry out a retrospective review of the effect of these decisions in order to obtain an objective basis to assess impacts on consumers – similar to The retrospective review carried out by the NZCC in 2023/2024 in relation to other older decisions.
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.
	In most situations, we consider that the 'substantial lessening of competition' test has been effective in practice in preventing mergers that harm competition. However, where the 'substantial lessening of competition' test has been less effective is in preventing the type of acquisitions that fall within creeping acquisitions and/or entrenching market power. A recent example of the latter in 2023/2024 relates to One NZ's successful application to the NZCC to acquire telecommunications spectrum from Dense Air. That acquisition removed what 2degrees considered to be one of the few available sources of spectrum necessary for it to compete more strongly with One NZ and Spark, particularly in relation to the provision of wireless broadband services. While the NZCC determined that the acquisition may not have had the effect of substantially lessening competition in a market on its own, the strong market position One NZ (and Spark) were already in relative to 2degrees in respect of spectrum holdings was entrenched by that acquisition. By way of full disclosure, we acted for 2degrees in relation to submitting to the NZCC on this acquisition.
4.	Should the 'substantial lessening of competition' test be amended or clarified, including for: 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?

	b. Entrenchment of market power (eg including acquisitions relating to small or nascent competitors)? c. In relation to just the merger provisions or wherever the test applies in the Commerce Act? If so, how? Please provide reasons.
	Factoring in our views expressed in response to Question 3, we consider that introducing a creeping acquisition standard would be worthwhile. The Australian reforms to their merger regime (which take effect from 1 January 2026) provide that an acquisition will be taken to have the likely effect of substantially lessening competition (**SLC**) in the relevant market/s if the cumulative competitive effect of acquisitions by the acquirer and the target (and any interconnected bodies corporate of each) within the last three years in the same industry would have the likely effect of SLC in the relevant market/s. We agree with the proposal in the discussion document of targeted alignment with the proposed reforms in Australia here. In terms of a timeline for assessment, we agree with the position in Australia that a three year window for assessing cumulative acquisitions is appropriate. Extending it beyond three years could raise relevance issues or effects substantiation issues (i.e. the relevant markets could materially change in an extended timeframe – the NZCC picked up on trends like this in its 2023/24 ex-post review of the Goodman Fielder/Lion merger), while narrowing it to a timeframe below three years may not sufficiently capture competitive harm that could result from multiple acquisitions. A three year period is also consistent with the existing limitation period for the NZCC to bring proceedings for penalties for acquisitions under section 83 of the Commerce Act. We also consider that a prohibition against entrenchment of market power should be introduced. Such a prohibition would be consistent with the recent Australian reforms, using the same language of "creating, strengthening or entrenching a substantial degree of market power in a market" (as noted in the discussion document), as well as the existing European Commission merger test which prohibits acquisitions if they strengthen a dominant position. In relation to Question 4(c), we consider the purpose/effect of SLC in a market test used for the purposes of ss 27/36 is fit for purpose and does not require updating. Accordingly any change should just be made in relation to the merger provisions of the Commerce Act. We note that the amendments to the SLC test in Australia were also limited to the merger regime. We have provided comments on the collaborative activities exception (which includes consideration of SLC) in the relevant section of this submission below.
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.

	Consistency with the Australian merger test would be desirable to establish a common standard for applicants which are required to file in multiple global jurisdictions. It would also be beneficial for Australian-based applicants which are considering acquisitions in New Zealand.
6.	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?
	We consider that the current merger regime is generally effective in balancing the risk of not enough versus too much intervention in markets. Our view is that the NZCC currently operates an effective merger surveillance system, as well as its complaints/screening mechanism, which mean that introducing a compulsory filing regime and/or minimum thresholds for compulsory filing are not required. The section 47 proceedings filed against Alderson Logistics, and the declined application by Alpha Theta to acquire Serato, along with the successful judgments obtained under section 47 against Objective and First Gas, as well as the settlement with Wilson Parking referred to in our response to Question 1, are examples of the NZCC's surveillance tools working effectively. However, as noted above, we consider that there would be merit in introducing prohibitions against other forms of acquisitions that the current test does not capture fully, such as creeping acquisitions and acquisitions of nascent competitors. A consistent approach with the new standards in Australia would seem the logical way forward, as noted in our response to Question 5.
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.
	The definition of 'substantial degree of influence' is vague at present. Because of this vagueness, we do not consider there is an issue with the test not being wide enough to capture all the circumstances in which a firm may influence the activities of another. There is enough scope for the current test to cover the relevant circumstances. However, there is limited guidance in the current test for merger parties considering whether clearance/authorisation is necessary. The test would therefore benefit from further clarification as set out below.
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.
	As noted above, we consider that the Commerce Act should be amended to provide relevant criteria and/or further clarify how to assess effective control. We agree that it would be helpful to make more explicit the factors that should be considered when assessing a substantial degree of influence, for example any veto rights over strategic decisions such as a company taking on debt / getting more capital that could stunt their potential growth.

	In terms of how the test should be amended, we consider the proposed Australian merger reforms in this area would provide a useful reference point, bearing in mind the merits of having alignment between Australian and NZ law in this area.
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?
	We do not consider that 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. We have not found this to be an issue from a practical perspective in our work to date.
10.	If you consider there is a problem, how should the phrase be amended? For example, by: a. referring simply to "assets"? or b. should the definition of "assets" in the Commerce Act be further refined?
	Please see the response to Question 9 above.
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand's voluntary merger regime is working?
	Please refer to our responses to Questions 1, 3 and 6. As stated there, we consider that New Zealand's voluntary merger regime is working well generally – but would still be improved by enhancements to reflect creeping acquisitions and entrenchment of market power. The NZCC's crack down on non-notified acquisitions in recent years (for instance the proceedings against Objective and First Gas for breaches of s 47), as well as the increase in penalties for breach of s 47, has meant that companies are now being more cautious in proceeding with acquisitions without notifying the NZCC. In addition, we note that the NZCC's acceptance in practice of courtesy letters is also effective, as it allows practitioners to explain why their clients do not propose to apply to the NZCC for clearance, while giving the NZCC the opportunity to request further information if necessary.

12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
	We do not consider this to be a major issue. Please refer to our responses to Questions 1, 6 and 11.
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.
	We do not consider that these additional powers for the NZCC are necessary. In particular, if the NZCC is not satisfied once it has reviewed courtesy letters and/or worked through the merger surveillance process, it already sends out what are in effect call in letters to non-notified merger parties. While not binding, these essentially inform the merger parties that a s 47 investigation would be opened if they did not file for clearance/authorisation. In our experience, companies in this situation will then almost always file an application for clearance / authorisation since otherwise they will face Court proceedings from the NZCC (including if necessary an injunction preventing the acquisition from proceeding further pending the resolution of those proceedings). Nor is a mandatory notification power necessary for designated companies. The kind of large companies that would likely face designation (such as the major supermarkets etc) are already on the NZCC's market surveillance watch list, and we would expect they would approach the NZCC in respect of a material acquisition in any event regardless of being designated.
Issue 5 – Behavioural undertakings	
14.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
	Yes – there are current difficulties with NZ not accepting behavioural undertakings in contrast with a number of other major jurisdictions. We recommend that the NZCC is allowed to accept these, and that the NZCC is provided with the resources to monitor ongoing compliance with the undertakings. We do agree that the NZCC's ability to accept behavioural undertakings should be limited to circumstances where no appropriate structural remedies are available, and when monitoring compliance with the undertaking would not be overly costly or complex. This final point is important to keep under consideration, as the cost of monitoring compliance could be significant in certain cases.

	We do not support amending the Commerce Act to allow the NZCC to accept behavioural undertakings as part of an authorisation proceeding only. Instead, the NZCC should be able to accept behavioural undertakings for clearance applications as well in appropriate situations.
Anticompetitive conduct	
Issue 6 – Facilitating beneficial collaboration	
15.	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.
	There is current uncertainty regarding the application of the collaborative activities exception to cartel conduct. While there is an avenue for seeking clearance through the NZCC, this is a costly process to adopt and the decision by the NZCC to decline to grant clearance to Anytime Fitness in 2022 (Commerce Commission - Anytime NZ Limited) has likely had the effect of disincentivising parties to go through the clearance regime. While this uncertainty may not have deterred arrangements that we consider to be beneficial, it has led to greater legal advice costs for companies in order to obtain comfort that they will fall within the collaborative activities exception – in circumstances where they would otherwise face substantial penalties (including the risk of criminal conviction for cartel conduct) if the exception does not apply. Accordingly, we consider that the collaborative activities test would benefit from further clarification.
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?
	We consider that further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act. We provide comments on how further clarity could best be introduced in our response to Question 17. As an example, the Collaboration and Sustainability Guidelines published by the NZCC in November 2023 provide useful examples of sustainability focused collaboration that would be likely or unlikely to raise s 30 issues.
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?

	Our views on the various options outlined in the paper are set out below: • Option 1 (NZCC role issuing guidance) – the NZCC already issues guidance, but further guidance would be welcome. We would recommend that this takes a similar structure to the s 36 guidelines issued by the NZCC in 2023 and the Collaboration and Sustainability Guidelines published by the NZCC in November 2023, including practical examples to show situations where collaboration would/would not raise issues. • Option 2 (empower NZCC to create safe harbours) – this would be a good system to put in place following further consultation/submissions by the NZCC with/from stakeholders. • Option 3 (statutory notification regime for specified classes of arrangements) – we do not recommend this option. The issue here is with obtaining greater certainty when first considering collaborations, rather than adding an additional layer of engagement with the NZCC. If there is better guidance on what types of collaboration would fall inside/outside the NZCC's focus, parties and their legal advisors can then decide for themselves whether they need to engage with the NZCC, which would also minimise the cost of enforcement. • Option 4 (empower NZCC to create class exemptions) – we consider this option has merit, similar to our comments in relation to Option 2 above. • Option 5 (Small business exception fee) – while we do not rule out this option, Options 1, 2 and 4 appear to us to be the more important options to prioritise at this stage.
18.	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?
	Our preferred option is a combination of options 1, 2 and 4. These avoid additional costs of engagement with the NZCC (both for the parties and the NZCC), and create greater certainty prior to engaging in any collaborative conduct, rather than working through collaboration plans only for them to be struck down by the NZCC. If the test were to remain the same, and the only ability for NZCC review prior to any s 30 investigation is through the existing clearance framework, we consider that clear guidance from the NZCC on the scope of "reasonably necessary" and "dominant purpose of lessening competition" in the application of the collaborative activities exception would be appropriate, as well as more detailed examples of competitor collaboration that falls inside or outside the exception (as noted in our response to Question 17). Essentially, this would be something along the lines of option 1.
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?
	We consider that the Commerce Act already adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them. While tacit collusion is not directly prohibited by s 30, the existing cartel prohibition already prohibits any tacit collusion becoming formalised. In particular, the inclusion of "understandings" constituting cartel provisions in s 30 gives the NZCC wide scope to consider conduct to constitute a cartel provision (i.e. written agreement is not required). We expect this already has the effect of deterring the tacit collusion identified in the discussion document, especially with the criminal consequences now in place for cartel conduct. For instance, the discussion document refers to "the gap" in the current regime being "concerted or facilitating practices with communication between parties" (p28). Examples of such communications are set out on p28 as being competitors sending price lists or manuals to each other to limit competition between them. However, we consider such conduct would already amount to an arrangement or understanding between competitors that would fall within s 30.
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 do not consider it is necessary to have a concerted practices prohibition. The "gap" identified in the discussion document would in our view constitute an understanding between competitors, which would already be captured by s 30. However, if a concerted practices prohibition were to be introduced, we consider that the approach in Australia, as set out in the ACCC guidelines would be appropriate – with prohibited concerted practices defined as acts "replacing or reducing competitive, independent decision-making with cooperation with competitors, such as by communicating and exchanging strategic commercial information" with the effect/likely effect of SLC.
Code or rule-making powers and other matters	
Issue 8 – Industry Codes or Rules	
21.	Do you consider that industry codes or rules could either: 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.

	We have no comment here.
22.	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?
	We have no comment here.
23.	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?
	We have no comment here.
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
	Consistent with the proposal to allow the NZCC to accept behavioural undertakings, we consider that the injunction powers of the Courts in the Commerce Act should be extended to allow for mandatory injunctions and not just prohibitive injunctions – but subject to the standard common law principles that such mandatory injunctions will only be ordered in limited circumstances.
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.
	We consider that the NZCC does its best to maintain the balance between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability under the Official Information Act. However, an issue that we are encountering frequently both in relation to acquisitions but also in relation to more general Commerce Act investigations is Official Information Act requests by other parties for copies of information that our clients have given to the NZCC on a confidential basis.

	This is causing two primary issues in response: • The first is a reluctance by parties to provide sensitive information to the NZCC in the knowledge that a third party (such as a competitor) may then be able to access that information through the Official Information Act. This means that the NZCC may not be receiving the fullest information that it needs to provide a decision. • The second issue is the administrative burden on the NZCC due to responding to these Official Information Act requests – which in turn impacts on the NZCC's ability to meet statutory deadlines.
26.	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.
	For the reasons above, we consider there would be benefit in amending the Official Information Act in one of two ways: • amending s 9(2) to include as another reason for withholding official information where the withholding of the information is reasonably necessary to allow the NZCC (and other equivalent regulatory bodies) to carry out its investigative functions under the Commerce Act; or • amending s 6 to include likely prejudice to the NZCC (and other equivalent regulatory bodies) carrying out its investigative functions under the Commerce Act (i.e. not just the "*investigation, and detection of offences*" as is currently the case under s 6(c)) as a "conclusive reason" for withholding official information.
27.	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?
	For the reasons above, we consider there would be benefit in strengthening the ability of the NZCC to make confidentiality orders under s100 of the Act. At present, this power does not seem to be used widely by the NZCC. Explicitly enabling the NZCC to use s 100 orders to provide restricted access to information specified in the order subject to terms and conditions would strengthen the NZCC's ability to test confidential information on a restricted basis with specified external parties (such as legal or economic experts).
Issue 11 – Minor and technical amendments to the Commerce Act	
28.	What are your views on these proposed technical amendments to the Commerce Act?

	In relation to each of the proposed amendments: • Addressing shortcomings in the collaborative activity clearance regime: we agree with the proposed amendments, provided that the ability to specify a time period is limited to no less than five years. While potentially encouraging the NZCC to grant clearance in more situations, a less definite and/or shorter time frame may also dissuade parties from seeking clearance for beneficial collaborative activities in the first place. • Modernising search warrant powers: we agree with the proposed amendments. • Clarifying that conferences can be held online and across multiple dates: we agree with the proposed amendments. • Extending the power to serve notices in accordance with Court directions: we agree with the proposed amendments, provided the NZCC is given no greater power than what is already available to other regulatory agencies.
29.	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?
	Not at this stage.
Any other issues	
30.	Are there any other issues that you would like to raise?
	Not at this stage.
General Comments:	

This submission is made on behalf of Simpson Grierson, one of New Zealand's leading commercial law firms. The responses have been prepared by James Craig and Henry King, a partner and senior solicitor respectively, who are members of the competition team at Simpson Grierson.

This submission represents Simpson Grierson's views, and not necessarily the views of our clients.

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.