

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'*

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If you consider that we should not publish any part of your submission, please indicate which part should not be published, explain why you consider we should not publish that part, and provide a version of your submission that we can publish (if we agree not to publish your full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 If you indicate that part of your submission should not be published, we will discuss with you before deciding whether to not publish that part of your submission.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

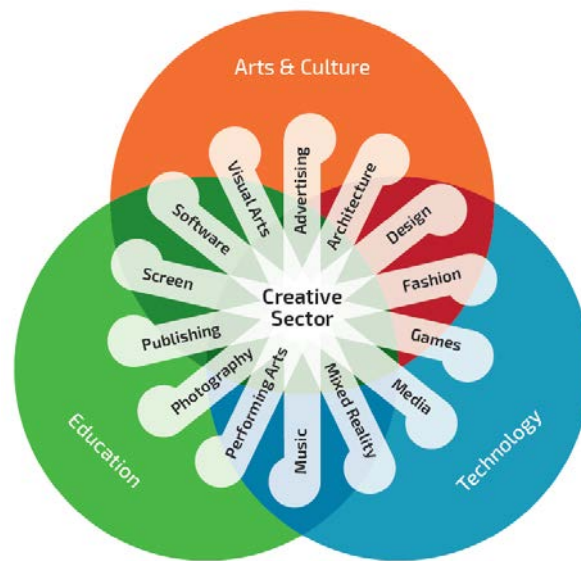
[To check the boxes above: Double click on box, then select 'checked']

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?*
	Paula Browning
3.	Do you consent to your name being published with your submission?*
	<input checked="" type="checkbox"/> Yes <input 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.
	WeCreate Incorporated
9.	If you are submitting on behalf of an organisation, which of these best describes your organisation? Please tick one.
	<input type="checkbox"/> Law Firm <input type="checkbox"/> Consumer organization <input type="checkbox"/> Consultancy <input type="checkbox"/> Think-Tank <input type="checkbox"/> Advocacy group <input type="checkbox"/> Business/Private Firm <input type="checkbox"/> Contractor/SME <input type="checkbox"/> Registered charity <input checked="" type="checkbox"/> Non-governmental organisation <input type="checkbox"/> Academic Institution <input type="checkbox"/> Central government <input type="checkbox"/> Iwi, hapū or Māori organisation <input type="checkbox"/> Academic/Research <input type="checkbox"/> Other. Please describe:

WeCreate is the alliance of Aotearoa’s major creative industry associations and organisations (representing 30,000+ Kiwi creators, support people, and creative businesses), which was founded in 2014 to propel growth in the sector and increase its contribution to New Zealand’s social, cultural and economic wellbeing.

The creative economy contributes \$16b¹ to New Zealand’s GDP and, with the right policy settings, could be worth \$25b by 2030. Our sector is an ecosystem and much of the talent we have is fostered in and by arts and culture organisations, as shown in the diagram below.



Please note that our comments and feedback come from knowledge of markets for creative products and services, in particular digital markets. We do not, and do not purport, to have in-depth or legal knowledge of the current Act.

¹ [Arts and Creative Sector economic profiles 2023 | Manatū Taonga | Ministry for Culture & Heritage \(mch.govt.nz\)](https://www.mch.govt.nz/arts-and-creative-sector-economic-profiles-2023)

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.
	<p>Our comments on the merger regime relate to how the Act considers and defines a market prior to determining whether a proposed merger would lessen competition. Much of the business activity of the New Zealand creative sector is undertaken in a global market, including digital markets. New Zealand consumers also have access to creative products and services from global markets. For example, the SVOD (subscription video on demand) market in New Zealand includes both local (eg SkyNZ, ThreeNow, TVNZ) and offshore (eg Netflix, Amazon Prime, Disney) companies. The investment in both the technology and content required to compete with the overseas SVOD companies is significant, but without local SVOD New Zealand consumers will have reduced access to local stories and local media.</p> <p>In addition to digital markets for digital goods, there are also markets for physical goods that are accessed digitally – both local and in other countries. There are only two references to digital markets in the whole of the discussion document and the examples given relate to supply of, and markets for, physical goods with no reference to digital access. This seems a very limited approach in 2025 when consumers have greater access than ever before to offshore suppliers. The rise and reach of Temu (as a competitor to the likes of The Warehouse and K-Mart) is just one example.</p>
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.
	As noted above, in the digital world New Zealand consumers can access (almost literally) the world’s content, and many other goods and services. Some of the is content is paid for, and a lot is “free” (if the capture and commercial use of data is ignored). We submit that addressing market definition – as we have outlined above - in the Commission’s merger considerations, will provide better outcomes for both consumers and New Zealand businesses that are trying to compete in a global market.
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.

4.	<p>Should the ‘substantial lessening of competition’ test be amended or clarified, including for:</p> <ol style="list-style-type: none"> 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? <p>If so, how? Please provide reasons.</p>
	<p>New Zealand, like Australia and many other non-US countries, needs a legislative framework to minimise the various impacts of the Big Tech platforms (Alphabet/Google, Meta/Facebook/Instagram, Amazon, Apple, OpenAI, Nvidia, Microsoft), including the impacts noted in a-c above.</p> <p>Google is facing a number of antitrust and anti-competitive cases around the world, including in the US. Google is facing a competition investigation in the UK. Where else does it face antitrust cases? Euronews The fact that the Commerce Act has not been updated for 20 years (and is unlikely to be substantially updated again in the near future) means that the legislation, and any associated regulations, must have provisions that enable New Zealand to be responsive to changes in technology as these effect New Zealand businesses and consumers.</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 example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.</p>
	<p>We are not in a position to comment on the test, however we can note that the Australian government has demonstrated a willingness to consult, and respond, to changes in digital markets.</p>
6.	<p>How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?</p>
<p>Issue 2 – Substantial degree of influence</p>	
7.	<p>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.</p>

	Please see comments above re digital markets. These differ greatly from markets that only operate within New Zealand and, therefore, require a different approach when assessing “influence”. The business practices of the Big Tech companies go, we submit, well beyond “substantial degree of influence” to monopoly behaviour, including in the New Zealand market. The control of digital advertising markets by Google and Facebook is a clear example.
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.
	Yes – with a focus on digital markets.
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?
10.	If you consider there is a problem, how should the phrase be amended? For example, by: <ul style="list-style-type: none"> a. referring simply to “assets”? or b. should the definition of “assets” in the Commerce Act be further refined?
Issue 4 – Mergers outside the clearance process	
11.	What are your views on how effectively New Zealand’s voluntary merger regime is working?

12.	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.
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> <ul 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.	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?
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.

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?
17.	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?
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?
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?
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.
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?
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?

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

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.
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:

We encourage active consideration of digital markets when considering proposed changes to the Act and would be happy to help MBIE explore this area more deeply, in conjunction with businesses in our sector.

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.