



Promoting Competition in New Zealand: A Targeted Review of the Commerce Act 1986

Submission from Woolworths New Zealand Limited

14 February 2025

1. Introduction

- 1.1. This document outlines Woolworths New Zealand Limited's (**WWNZ**) feedback in response to a selection of relevant questions from the Ministry of Business, Innovation & Employment's (**MBIE**) request for views on its *Discussion document: Promoting competition in New Zealand - a targeted review of the Commerce Act 1986* (**Discussion Document**). WWNZ has focused on three topics where it has particular views that it considers can assist the consultation process. These topics are:
 - 1.1.1. facilitating beneficial collaboration (responding to Discussion Document questions 15 - 18);
 - 1.1.2. industry codes or rules (responding to Discussion Document question 23); and
 - 1.1.3. the Commerce Commission's (**Commission's**) protection of confidential information (responding to Discussion Document questions 25 and 26).

2. Our submissions

2.1. Facilitating beneficial collaboration

- 2.1.1. There will be instances where collaboration between competitors is beneficial to consumers and New Zealand - including collaboration on sustainability and recycling initiatives and responses to natural disasters or emergency situations (such as Cyclone Gabrielle or the COVID-19 pandemic).
- 2.1.2. However, WWNZ's experience is that the current Commerce Act regime does not facilitate, and can deter, businesses from engaging in such beneficial initiatives. In particular, given the significant consequences of breaching the cartel prohibitions and the lack of clear guidelines or precedent, the current regime of requiring businesses to either:

- 2.1.2.1. self-assess that their collaboration is compliant; or
- 2.1.2.2. seek a costly, time-consuming and public collaborative activities clearance or authorisation,

means that businesses often ultimately choose to not collaborate with competitors even where that collaboration is motivated by pro-competitive or other “environmental, health and safety, or other social welfare purpose[s]”.¹

- 2.1.3. WWNZ considers that there are options that could assist in resolving these concerns - namely:

- 2.1.3.1. enabling the Commission to grant timely “**interim authorisations**” where there is a need for urgent collaboration, in the same way that the Australian Competition and Consumer Commission (**ACCC**) can (and did so, for example, in relation to supermarket cooperation in response to COVID-19).² Unlike the Commission, the ACCC is able to grant such authorisations in a matter of days, which can be critical in responding to urgent issues.
- 2.1.3.2. enabling the Commission to issue binding “**block exemptions**” or “**safe harbours**” for certain types of collaboration (which would not breach the Commerce Act), as used by the European Commission and made available to the ACCC as a result of recent Australian reform allowing the ACCC to grant class exemptions. This would provide greater assurance and certainty to New Zealand businesses contemplating beneficial collaborations, and is particularly important as businesses look to support the country’s emissions and sustainability targets. The introduction of binding block exemptions should be supported by substantial procedural safeguards for introducing, amending or removing safe harbours to balance flexibility with legal certainty. WWNZ submits that these safeguards should include public consultation, transparent criteria for eligibility and clear timeframes for review.

2.2. Industry codes or rules

- 2.2.1. WWNZ considers that the development of industry specific codes or rules should require primary legislation, and should not be able to be developed and implemented by the Commission without parliamentary scrutiny, or at the least Government / Ministerial approval. That is to ensure that there is:

¹ The Commission’s Competitor Collaboration Guidelines note: “We recognise that parties collaborate for a number of reasons other than to lessen competition.... For example, parties may collaborate to achieve some environmental, health and safety, or other social welfare purpose, which is unrelated to their individual or collective competitiveness.” See:

https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf

²

<https://www.accc.gov.au/about-us/news/media-updates/accc-grants-interim-authorisation-for-ongoing-supermarket-cooperation-on-covid-19-response-0>

- 2.2.1.1. broad consideration of the policy and economic implications of codes prior to implementation - including to ensure they are consistent with Government policy on regulation, its agenda for economic growth, and do not risk adverse or unintended consequences for the economy; and
- 2.2.1.2. separation of powers between the bodies making codes or rules and those enforcing them, to ensure adherence to rule of law / natural justice principles.
- 2.2.2. In addition, prior to an industry specific code being implemented, WWNZ considers that there should be clearly articulated requirements, including:
 - 2.2.2.1. a clear threshold for when a code or rules can be enacted (including mandatory cost-benefit analysis);
 - 2.2.2.2. a requirement to consult with affected parties; and
 - 2.2.2.3. regular reviews to assess their effectiveness of any codes or rules (albeit not too frequent to undermine regulatory certainty).

Such oversight should be particularly stringent where a code or rules would impose significant obligations on businesses. These safeguards will help ensure that industry codes or rules are effective, properly targeted, and developed transparently and with accountability.

- 2.2.3. Furthermore, when any codes or rules are implemented, WWNZ considers that the Commission (or other regulatory body charged with enforcing the code or rules) should be required to:
 - 2.2.3.1. provide guidelines on their interpretation and enforcement approach, to minimise regulatory uncertainty and costs to the businesses that are subject to them; and
 - 2.2.3.2. consult with the businesses subject to the code / rules, in a fair and transparent way, to ensure all stakeholders are afforded appropriate natural justice rights in relation to the expectations on them and the impact on their reputation of being subject to an industry specific regime. From a natural justice and process perspective, it is important that any increase in the Commission's powers are matched by an increase in their accountability to the key affected stakeholders.

2.3. **Commission protection of confidential information**

- 2.3.1. The Commission's ability to protect commercially sensitive information from disclosure is crucial to ensuring that parties are able to constructively engage with the Commission, and voluntarily provide information to the Commission. WWNZ considers that businesses' willingness to voluntarily disclose information to the Commission would be further supported by

adjustments to the Commission's statutory powers to introduce or clarify processes for handling commercially sensitive information, such as:

- 2.3.1.1. allowing businesses to request confidentiality protections or redactions where appropriate, ensuring that sensitive materials are handled securely and fairly; and
 - 2.3.1.2. mandatory obligations on the Commission to consult with the providers of information prior to disclosure to third parties, including, where the Commission has used a discloser's information to conduct its own analysis, obligations on the Commission to correct any identified factual errors prior to release.
- 2.3.2. Further, in WWNZ's experience, the scale of information that the Commission can request from businesses, all of which could potentially be subject to an Official Information Act request, can create reason for concern. Not only is confidentiality an issue, but businesses are often also required to expend considerable resources gathering information to provide to the Commission. WWNZ would support clarifications in the Commerce Act to require the Commission to:
- 2.3.2.1. engage with businesses to determine reasonable scopes for information requests and deadlines for responses;
 - 2.3.2.2. ensure that the information requests it issues are specific, clear, and narrowly focused on the information necessary for the statutory purpose, so that businesses can understand what questions the requests are seeking to answer; and
 - 2.3.2.3. work with businesses to resolve ambiguities relating to information requests in a timely manner.
- 2.3.3. These requirements would ensure that information requests remain manageable and aligned with business realities, to support constructive relationships between businesses and the Commission.

3. Concluding comments

- 3.1. WWNZ is grateful for the opportunity to submit, and is available to provide further information to MBIE as helpful.