



## COVERSHEET

<b>Minister</b>	Hon Scott Simpson	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Changes to improve competition settings	<b>Date to be published</b>	16 September 2025

### List of documents that have been proactively released

<b>Date</b>	<b>Title</b>	<b>Author</b>
June 2025	Commerce Act Review – Changes to improve competition settings	Office of the Minister of Commerce and Consumer Affairs
25 June 2025	Commerce Act Review – Changes to improve competition settings ECO-25-MIN-0098 Minute	Cabinet Office
August 2025	Commerce Act Review – Further changes to improve competition settings	Office of the Minister of Commerce and Consumer Affairs
20 August 2025	Commerce Act Review – Further changes to improve competition settings ECO-25-MIN-0134 Minute	Cabinet Office
20 August 2025	Regulatory Impact Statement – Targeted review of the Commerce Act 1986	MBIE
August 2025	Commerce Commission Governance and Effectiveness	Office of the Minister of Commerce and Consumer Affairs
20 August 2025	Commerce Commission Governance and Effectiveness ECO-25-MIN-0133 Minute	Cabinet Office
13 June 2025	Governance and Effectiveness Review of the Commerce Commission – Final Recommendations Report	Dame Paula Rebstock, Professor Allan Fels AO, David Hunt
June 2025	Commerce Commission – Response to the Governance and Effectiveness Review	Commerce Commission

### Information redacted

**YES / NO** (please select)

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of confidential advice to Government.

**In confidence**

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Policy Committee (ECO)

**Commerce Act review: Changes to improve competition settings**

**Proposal**

- 1 This paper seeks agreement to amend the Commerce Act 1986 to improve the clarity, predictability and effectiveness of New Zealand's competition settings.

**Relation to government priorities**

- 2 This paper relates to the Q2 Action Plan commitment to take Cabinet decisions on reforms to the Commerce Act to improve competition settings.
- 3 One of the central pillars of the Government's *Going for Growth* agenda is promoting competition. Competitive markets drive productivity by encouraging innovation, investment, and the efficient allocation of resources. Where firms are exposed to competitive pressure, they face stronger incentives to improve performance, reduce costs, and respond to consumer demand – all of which contribute to a more dynamic and productive economy.
- 4 The proposed amendments to the Commerce Act support this objective by improving legal certainty for businesses, reducing unnecessary compliance costs, and ensuring that regulatory tools are targeted, proportionate and fit-for-purpose. In doing so, the reforms aim to create the conditions for more dynamic markets and sustained productivity growth across the economy.

**Executive summary**

- 5 This paper seeks Cabinet agreement on the first phase of a package of reforms aimed at improving competition settings and updating the Commerce Act.
- 6 I will be coming back to Cabinet shortly with the findings from the Independent Governance and Effectiveness Review of the Commerce Commission (**the Commission**), alongside the second phase of policy decisions on the Commerce Act – directly relating to competition and the role the Commission has in enforcing and regulating this.
- 7 New Zealand's economy is characterised by a pattern of increasing market concentration and diminishing levels of competition. New Zealand's competition law is no longer fit for purpose in the face of increasingly concentrated markets and global shifts in regulatory practice. I am proposing a suite of reforms to address gaps in New Zealand's competition legislation and to promote business dynamism.
- 8 I propose enabling the Commission to more easily clear business collaboration that delivers public benefits and poses low risk to competition.

- 9 I also propose making enhancements to the Commission's powers to obtain performance injunctions and protect commercially sensitive information. These changes are designed to lift regulatory certainty, reduce compliance costs, and enable faster, more effective responses to emerging competition harms.
- 10 The recommendations reflect consultation with legal, economic and industry stakeholders. They also respond to recommendations from the OECD to strengthen New Zealand's competition policy in light of persistently low productivity and weak competitive pressure.<sup>1</sup>

### **Problem definition**

- 11 Competition is a key driver to boosting productivity and lifting living standards. New Zealand's competition law is no longer fit for purpose in the face of increasingly concentrated markets and global shifts in regulatory practice. The Commerce Act lacks the tools, flexibility, and certainty needed to maintain effective competitive pressures across the economy. Market studies into groceries, fuel, building supplies, and banking have shown persistent oligopolistic structures and weak competitive dynamics,<sup>2</sup> and productivity remains well below the OECD frontier.<sup>3</sup>
- 12 A 2016 MBIE study assessing over 300 industries found signs of weak competition particularly in banking, agriculture, forestry, fishing, finance and insurance, and wholesale trade.<sup>4</sup> The OECD's 2024 Economic Survey of New Zealand also identified limited competition in ports, airports, airlines, retail financial services, retail building supplies, retail fuel and retail electricity.<sup>5</sup> Together, these findings suggest that while not all sectors are highly concentrated, a significant number exhibit oligopolistic features with persistent barriers to entry or expansion.
- 13 New Zealand's competition law currently has gaps in the tools available to stop markets becoming concentrated, to the detriment of consumers, and tools to stop firms with market power creating barriers to new firms entering a market. The Commerce Act can also stifle welfare enhancing business collaboration by requiring firms to apply through a long and expensive process to ensure they can collaborate without infringing competition law.

### **Background**

- 14 In September 2024, Cabinet agreed to a targeted review of the competition settings in the Commerce Act [ECO-24-MIN-0206 refers]. Public consultation on the review ran from 5 December 2024 to 17 February 2025.
- 15 Feedback highlighted systemic concerns, including a lack of clarity around the boundary between cooperation and collusion, limitations in the Commerce Act's enforcement tools, and inadequate protection of confidential information. The review considered recommendations from the OECD to strengthen New

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<sup>1</sup> OECD Economic Survey: New Zealand, May 2024 OECD Economic Surveys: New Zealand 2024 | OECD.

<sup>2</sup> Commerce Commission market studies, Commerce Commission - Market studies.

<sup>3</sup> OECD Economic Survey of New Zealand 2024, OECD Economic Surveys: New Zealand 2024 | OECD.

<sup>4</sup> MBIE, Competition in New Zealand Industries.

<sup>5</sup> OECD Economic Surveys: New Zealand 2024 (EN)

Zealand's competition law,<sup>6</sup> alongside findings from the Independent Governance and Effectiveness Review of the Commission.<sup>7</sup>

### Supporting beneficial collaboration

- 16 The current Commerce Act provisions do not adequately support low-risk, pro-competitive collaboration. While the Commerce Act provides for clearance and authorisation pathways to clear collaborative activity, the process is complex, costly, and uncertain. The authorisation process alone costs \$36,800 in application fees, typically involves significant legal complexity, and can take around 150 working days. This makes it inaccessible to many organisations, including small businesses. These businesses are then discouraged from collaborating on projects that can have broader economic and social benefits, such as research and development and cooperation during times of emergency relief.
- 17 For example, the Fired Up Stilettos collective (19 independent nightclub performers) sought to negotiate standardised venue terms to improve transparency and safety but were unable to proceed due to cost and legal risks. Petrol companies have also raised concerns over sharing of information during cyclone relief to preserve security of supply of fuel to affected regions. The Accident Compensation Corporation (**ACC**) has also encountered legal barriers when seeking to jointly procure health services with Health New Zealand – despite efficiency and funding benefits.
- 18 Concerns have also been raised by banks in particular that industry-wide anti-scam initiatives risk breaching cartel provisions. This work, which I am leading alongside government agencies and industry, is all about protecting consumers and disrupting criminal activity.
- 19 I propose introducing a new framework to better support beneficial collaboration, while retaining core competition safeguards. This will include:
  - 19.1 *A statutory notification regime*, allowing firms to notify the Commission of proposed collaborative conduct and to proceed unless the Commission objects. This would provide a low-cost alternative to authorisation for arrangements that may technically breach cartel provisions but are unlikely to harm competition. This would be modelled on a similar power in Australia.
  - 19.2 *New class exemption powers*, enabling the Commission to exempt classes of conduct that may technically breach the Commerce Act but are likely to cause minimal harm to competition, or create public benefits, such as collective bargaining by small businesses or horizontal agreements. This would be modelled on similar powers in Australia, the UK or EU.

<sup>6</sup> OECD Economic Survey: New Zealand, May 2024 OECD Economic Surveys: New Zealand 2024 | OECD.

<sup>7</sup> The review focussed on ensuring the Commission has the right expertise and structures in place to make effective and timely decisions. I received the final report on 13 June and am considering its findings.

- 19.3 *Fee relief mechanisms*, granting the Commission discretion to waive or reduce authorisation and clearance fees where appropriate.
  - 19.4 *Streamlining the clearance process*, by clarifying that where businesses are only seeking assurance that their conduct qualifies as legitimate collaboration, the Commission need only assess the collaboration's purpose and whether any cartel provisions are reasonably necessary. In these cases, the Commission will not be required to also assess whether the arrangement is likely to substantially lessen competition.
  - 19.5 *Flexibility for evolving collaboration*, by allowing clearance and authorisation for arrangements involving changing participants over time, such as multi-party sector initiatives or public-private partnerships.
- 20 The Commission will still be able to take action under the Commerce Act if it believes an agreement is likely to substantially lessen competition. In fact, they are likely to be in a stronger position than usual to do so, as it will already be on notice where a party has sought a collaborative activity clearance. Parties will also be aware of this, which creates a strong deterrent against attempting to disguise anti-competitive conduct as collaboration. This change would reduce duplication, simplify the process, and better align with the original policy intent behind the collaborative activity regime.

### **Court injunctions**

- 21 The Commerce Act currently allows the courts to stop unlawful conduct, but does not empower them to order firms to take certain action when a company's conduct has harmed competition. Performance injunctions are a tool used when monetary penalties or damages are insufficient to address harm created. An example of a performance injunction is to order a dominant company to supply a product or service to a competitor.
- 22 The inability of the Commission to seek performance injunctions limits its ability to restore competition, particularly in digital markets where dominant firms can entrench their position through conduct like self-preferencing or discriminatory access. During consultation, stakeholders such as the Coalition for App Fairness emphasised that mandatory corrective measures (such as preventing self-preferencing) may be necessary to restore healthy competition.
- 23 Performance injunctions are a standard tool overseas and under the Commission's own powers in telecommunications and retail payments. Without them, enforcement is less effective and inconsistent across regulatory settings.
- 24 Therefore, I propose amending the Commerce Act to allow the Commission to be able to apply for and obtain performance injunctions from the High Court that will require parties to remedy contraventions of the Commerce Act. This would align the regime with international and domestic best practice, ensure courts can require firms to actively address harm, and provide a more effective response to evolving competition issues. This can be modelled on section 49 of the Retail Payment System Act 2022. The Court would also have the power to grant interim performance injunctions where that is desirable.

## Protecting confidential information

- 25 Businesses and individuals are increasingly reluctant to share information with the Commission due to fears it could be released under the Official Information Act 1982 (**OIA**), citing risks of retaliation or misuse of information by competitors. The potential for disclosure has a chilling effect on third-party cooperation and disproportionately impacts small businesses, who are already reluctant to come forward. Submitters have echoed these concerns, citing risks of retaliation or misuse of confidential material by competitors. This is undermining the Commission's ability to collect evidence and receive useful information, particularly in investigations and merger clearances.
- 26 In a recent merger review, over 25 suppliers refused to engage with the Commission, citing OIA risks. In another, a whistleblower disengaged entirely after learning that the standard OIA protections would apply. In a third case, a competitor withdrew after learning that the applicant had requested their submission under the OIA. Even where information is obtained, Commission staff report that interviewees often omit key details.
- 27 To address these issues, I propose targeted legislative reform to:
- 27.1 Extend the Commission's power to issue confidentiality orders to cover classes of information or documents, to attach terms and conditions on any release, and to allow orders to continue to apply for up to 10 years after the Commission has finished a matter;
  - 27.2 Introduce a targeted provision preventing the disclosure of confidential information supplied to the Commission in the course of its functions to a requester under the OIA, subject to a 10-year sunset clause;
  - 27.3 Prohibit retaliation against parties who provide information or make complaints to the Commission. This would be modelled on the protections in the Protected Disclosures (Protection of Whistleblowers) Act 2022 and Sport and Recreation Integrity Act 2023 (with any necessary modifications), and would enable affected parties to take proceedings to obtain damages if they were subject to retaliation or victimisation.
- 28 Similar targeted provisions exist for other economic regulators. The Financial Markets Authority and Reserve Bank have confidentiality protections that restrict disclosure of information collected in the course of their functions. Information collected by the Commission is similarly sensitive and should have equivalent protections.
- 29 The risk of harm from releasing information generally diminishes over time. Therefore, I propose that the targeted provision be subject to a sunset period of 10 years. If a request was made for information after that time, the Commission would be required to consult the supplier of the information and determine whether it was necessary for the protection of the targeted provision to continue. If the protection was no longer necessary, the request would be considered under the OIA in the usual way.

## Minor and technical amendments

- 30 I am also proposing several minor and technical changes to improve the clarity and workability of the Commerce Act. These include:
- 30.1 *Clarifying search warrant powers* so the Commission can obtain warrants for non-traditional “places” such as vehicles or data storage devices to better align with modern enforcement needs.
  - 30.2 *Modernising how conferences are held*, making clear they can occur online and across multiple dates.
  - 30.3 *Improving service of notices* by allowing the courts to serve notices electronically or on overseas parties when needed.
  - 30.4 *Enabling flexibility in undertakings* by allowing variations where unforeseen events arise.
  - 30.5 *Allowing the Commission to request information in a usable format*, so it can carry out its functions more efficiently and avoid delays.
  - 30.6 *Permitting multi-lateral cooperation agreements*, removing current constraints that only allow bilateral arrangements.
  - 30.7 *Clarifying that compulsory responses cannot be used against a person in criminal proceedings*, while ensuring voluntary responses are admissible, resolving current drafting ambiguity.
  - 30.8 *Updating outdated definitions*, including “document”, “Minister”, and “publicly available” to align with modern communication formats and the Legislation Act 2019.
  - 30.9 *Removing redundant provisions*, including obsolete references, transitional clauses, and outdated methods for incorporating external material by reference.

## Financial implications

- 31 These proposals are not expected to require additional Crown funding at this stage. Most clarify or modestly expand the Commission’s existing functions, and implementation is expected to be managed within baseline funding. Some add or expand responsibilities, which may have resource implications over time.

## Legislative implications

- 32 I propose that the policy outlined in this paper be given effect through the Commerce (Promoting Competition and Other Matters) Amendment Bill, which is at priority category 5 (to proceed to Select Committee by the end of 2025).
- 33 The Commerce Act binds the Crown in so far as the Crown engages in trade (section 5).

## Impact analysis

### *Regulatory Impact Statement*

- 34 A panel with representatives from the Ministry of Business, Innovation and Employment and the Ministry for Regulation has reviewed the Regulatory Impact Statement and considers it meets the quality assurance criteria.

### *Climate Implications of Policy Assessment*

- 35 The Climate Implications of Policy Assessment (**CIPA**) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

## Population, cost-of-living and human rights Implications

- 36 There are no direct population, cost-of-living or human rights implications.

## Use of external resources

- 37 Ben Hamlin, a barrister with expertise in competition law, provided 53 hours of legal advice on the proposals in this Cabinet paper.

## Consultation

- 38 The Treasury, Ministry for Regulation, Ministry for Primary Industries, Ministry of Justice, Office of the Ombudsman, Ministry of Foreign Affairs and Trade and the Commerce Commission have been consulted on this paper. The Department of Prime Minister and Cabinet has been informed.

## Communications and proactive release

- 39 I expect to announce these proposals soon after Cabinet decisions are made. This paper will be published on MBIE's website within 30 working days after announcements have been made, subject to appropriate redactions.

## Recommendations

The Minister for Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that in 2024, Cabinet agreed to a targeted review of the economy-wide competition settings in the Commerce Act 1986 [ECO-24-MIN-0206 refers];
- 2 **note** that MBIE undertook public and targeted consultation on options for reform between December 2024 and April 2025;

### *Supporting beneficial collaboration*

- 3 **agree** to introduce a statutory notification regime to allow firms to notify proposed collaborative conduct and proceed unless the Commission objects;
- 4 **agree** to provide the Commission with a new class exemption power to proactively exempt classes of collaborative conduct;



- 5 **agree** to provide the Commission with discretion to waive or reduce clearance and authorisation fees where it considers it appropriate to do so;
- 6 **agree** to streamline the beneficial collaboration clearance process by clarifying that the Commission need only assess the conduct's purpose and whether cartel provisions are reasonably necessary, without also assessing broader competition impacts;
- 7 **agree** to allow clearance and authorisation to be granted for collaborative arrangements with changing participants over time;

*Strengthening enforcement and information handling*

- 8 **agree** to amend the Commerce Act to enable the courts to issue performance injunctions requiring parties to remedy contraventions of the Commerce Act;
- 9 **agree** to strengthen protections for confidential information provided to the Commission by:
  - 9.1 empowering the Commission to issue confidentiality orders over classes of information or documents with terms and conditions, specifying who the order applies to, extending the orders for a 10-year period post-investigation, and aligning the maximum penalties with those under section 103;
  - 9.2 limiting the disclosure of information supplied to the Commission in the course of its functions to a requester under the OIA, subject to a 10-year sunset clause;
  - 9.3 introducing anti-retaliation/victimisation protections for persons providing information or complaints to the Commission, modelled on those in the Protected Disclosures (Protection of Whistleblowers) Act 2022;

*Minor and technical changes*

- 10 **agree** to the minor and technical changes set out in paragraph 28 to improve the clarity and workability of the Commerce Act;
- 11 **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office (**PCO**) to give effect to the above decisions;
- 12 **authorise** the Minister of Commerce and Consumer Affairs to make minor or technical changes to the policy decisions in this paper, as well as additional policy decisions consistent with the general policy intent, on issues that arise during drafting and passage of the Bill through the House.

Authorised for lodgement

Hon Scott Simpson

Minister of Commerce and Consumer Affairs