MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

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

List of documents that have been proactively released		
Date	**Title**	**Author**
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.

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
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Regulatory Impact Statement: Targeted review of the Commerce Act 1986

Decision sought	Cabinet policy decisions on amendments to the Commerce Act 1986
Agency responsible	Ministry of Business, Innovation and Employment (**MBIE**)
Proposing Ministers	Minister of Commerce and Consumer Affairs
Date finalised	14/08/2025

Policy problem

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 1986 (**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,[1] and productivity remains well below the OECD frontier.[2] 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.[3] 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.[4] 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.

The current legal framework is contributing to these issues through:

1. *Deterrents to beneficial collaboration*

The current clearance and authorisation processes are complex and expensive ($36,800 filing fee), deterring beneficial collaboration. In 2024, the banking sector's anti-scam efforts faced challenges due to uncertainty under the Commerce Act. The Accident Compensation Corporation (**ACC**) has also identified limitations in the Commerce Act that impede collaborative efforts with other health sector agencies. Small business collective bargaining and environmental projects face similar barriers.

2. *Limited enforcement remedies*

Courts can only restrain conduct under the Commerce Act and cannot require firms to take corrective action to restore competition, even where harm is ongoing (often an issue with digital platforms).

[1] Commerce Commission market studies, Commerce Commission - Market studies.
[2] OECD Economic Survey of New Zealand 2024, OECD Economic Surveys: New Zealand 2024 | OECD.
[3] MBIE, Competition in New Zealand Industries.
[4] OECD, OECD Economic Surveys: New Zealand 2024 (EN).

3. *Weak protections for confidential information*

The Commission's ability to gather evidence is undermined by disclosure risks under the Official Information Act 1982 (**OIA**). In recent merger cases, suppliers and competitors refused to cooperate due to fear of exposure and retaliation.

4. *Weak merger control tools*

The Commerce Act cannot adequately address creeping or killer acquisitions, has limited clarity on substantial influence and the definition of "assets", and lacks powers to review non-notified mergers or accept behavioural undertakings. Between 2018 and 2025, the Commerce Commission (**Commission**) declined only two mergers (a 97.5% clearance rate). Earlier clearances, such as Woolworths/ Progressive, entrenched market power in the grocery industry and has led to costly sector-specific regulation.

5. *Legal uncertainty around AI and algorithmic coordination*

The law is unclear on whether firms are liable for anti-competitive conduct facilitated by artificial intelligence (**AI**) or pricing algorithms, despite growing use in sectors like retail, accommodation, and transport. International experience (such as the Amazon Marketplace case in the United Kingdom)[5] highlights real risks.

6. *No agile response to structural market problems*

Current tools rely on market studies and primary legislation, which are slow and resource intensive. This approach does not scale well across sectors, leaving persistent competition problems unaddressed.

7. *Unclear framework for addressing predatory pricing*

Predatory pricing involves firms with substantial market power selling products below cost, over a sustained period of time, with the aim of deterring entry or driving competitors from the market. The goal is to gain or maintain market power and then raise prices to above competitive levels over the medium-longer term. Predatory pricing is a breach of section 36 of the Commerce Act (misuse of substantial market power). However, there is no objective test for below-cost pricing, making enforcement difficult. This creates uncertainty for businesses, including new entrants, and limits the Commission's ability to promote competition when a firm with substantial market power prices below cost to block competitors from the market.

Policy objective

The Government is reviewing the Commerce Act to ensure New Zealand's competition settings remain fit for purpose. The objective of this review is to modernise the Commerce Act to ensure it promotes dynamic, competitive markets that support business innovation, productivity, and consumer welfare. The Commerce Act must deliver:

- business certainty through clear, predictable rules
- timely, transparent and cost-effective enforcement

[5] CMA, Case 50233, 12 August 2016, Decision of the Competition and Markets Authority: Online sales of posters and frames - Case 50223.

- international alignment where beneficial, and
- flexible tools to address concentrated market structures and respond to emerging harms in real time.

Options considered

The review considered seven key areas of concern in the Commerce Act. For each issue, the RIS assessed the status quo, one or more reform options, and in some cases, non-regulatory approaches.

The Minister of Commerce and Consumer Affairs is looking to progress the issues addressed in this Regulatory Impact Statement in two tranches. Tranche One policy decisions being sought from Cabinet are:

Issue 1: Supporting beneficial collaboration

- Option 1: Status quo – Businesses must use the full authorisation process to gain certainty, which is complex, costly, and rarely used.
- Option 2: Introduce a more accessible and flexible framework – Provides statutory notification, class exemptions, and streamlined authorisation, making it easier to approve low-risk, publicly beneficial arrangements (*MBIE & Minister preferred*)

Issue 2: Court injunctions

- Option 1: Status quo – Courts can restrain unlawful conduct but cannot order firms to take corrective action to restore competition.
- Option 2: Provide for performance injunctions – Allows the courts to issue performance injunctions to remedy contraventions of the Commerce Act (*MBIE & Minister preferred*)

Issue 3: Protecting confidential information

- Option 1: Status quo – Firms are reluctant to share confidential information with the Commission due to fears that it could be released under the OIA, potentially to competitors.
- Option 2: Operational improvements to protect confidential information under the OIA – Would clarify internal processes, but no legislative change.
- Option 3: Legislative reform to strengthen protections – Would provide better statutory protection to confidential information, giving businesses greater confidence to cooperate with investigations and enforcement action (*MBIE & Minister preferred*).

Tranche Two policy decisions being sought from Cabinet are:

Issue 4: Enhancing the merger regime

- Option 1: Status quo – Parties may voluntarily seek clearance or authorisation; no changes to process or thresholds.
- Option 2: Enhanced voluntary regime – Clarifies legal tests, introduces statutory timeframes, powers to address non-notified mergers, and allows for behavioural undertakings *(MBIE preferred*)

- Option 3: Mandatory notification regime – Would require parties to notify all mergers above a certain threshold.

Issue 5: Deterring anti-competitive conduct

- Option 1: Status quo – No clear liability for firms coordinating through algorithms, shared information, or other indirect means unless a formal agreement exists.
- Option 2: Confirm liability for anti-competitive conduct using AI tools – Ensures the Commerce Act remains effective as digital coordination becomes more common (*MBIE* preferred)
- Option 3: Introduce a general prohibition on concerted practices – Would capture coordination between firms even without a formal agreement.

Issue 6: Pro-competition rules

- Option 1: Status quo – Primary legislation is used to address sector-specific competition issues.
- Option 2: Cabinet-approved pro-competition rules – Enables targeted rules (in secondary legislation) to address material barriers to competition, entrenched market power, or significant harm that could not be remedied by enforcement of the general prohibitions alone (*MBIE preferred*)
- Option 3: Commission-issued pro-competition rules – Allows the Commission to develop and implement rules independently, without separate Cabinet approval each time.

Issue 7: Predatory pricing

- Option 1: Status quo – Enforcement remains rare due to the lack of an objective test for below-cost pricing.
- Option 2: Introduce a statutory objective economic test and make explicit that the Commission does not need to prove intent to recoup losses – Provides clear economic thresholds to support intervention before competition is harmed (MBIE preferred).
- Option 3: Empower the Commission to issue binding guidance – Allows the Commission to define and update the economic test through tertiary legislation, offering more flexibility but less long-term certainty.

Consultation

MBIE ran public consultation from 5 December 2024 to 17 February 2025, received 55 submissions, and conducted further targeted consultation with a wide range of stakeholders, including major law firms, economics, consumer groups, and businesses. Most supported the need for targeted reform, particularly around collaboration, behavioural undertakings, and information handling. Opinions diverged on introducing a concerted practice prohibition and a pro-competition rule-making power in the Commerce Act. The preferred options reflect a calibrated response that balances stakeholder feedback, international experience, and regulatory best practice.

Costs and benefits

	Costs	Benefits
Regulated groups	Some businesses may face **modest compliance costs,** particularly for: • Supporting beneficial business collaboration • Performance injunctions for anti-competitive conduct These costs may include: • **fees for statutory notification** (expected to be significantly lower than current authorisation fees).	Businesses will benefit from: • greater **clarity**, **certainty**, and **timeliness** in how the Commerce Act is applied • **significantly lower compliance costs** for clearing beneficial collaboration. • **Increased certainty** that the Commission will protect confidential business information. Overall, compliance costs are likely to decrease due to: • more accessible pathways for beneficial collaboration.
Regulator	**Minor costs could be associated with** increased statutory notifications for business collaboration; however, this will be mitigated by decreased requirement to assess collaborative agreements. There will be resource implications for the Commission in investigating the need for pro-competition rules and monitoring and enforcing any new rules. These costs are currently expected to be met from within baseline funding, including the market studies allocation.	The Commission will gain a more **effective** toolkit. This will allow the Commission to: • address harm created by anti-competitive conduct (through performance injunctions) • Improved confidentiality protections are expected to free up resources by enabling more efficient information handling.
Others	• Any administrative costs to other government agencies (e.g. related to legislative drafting or cross-agency coordination) are expected	Consumers will benefit from increased business cooperation for welfare enhancing projects including research and development that can: • Increase innovation

	to be manageable within existing baselines.	• lower prices, • improved product and service quality and innovation

Balance of costs and benefits

Overall, the benefits of the reform package are expected to significantly outweigh the costs. While the impacts have not been monetised – due to the long-term and system-wide impacts of competition policy – qualitative evidence supports the view that clearer rules, more timely interventions and modernised powers will improve outcomes and reduce long-term regulatory burden.

Implementation, monitoring and evaluation

MBIE and the Commission will work together to implement the reforms. Most changes will take effect six months after Royal Assent, supported by updated guidance, consultation, and communications.

MBIE and the Commission will monitor uptake and effectiveness in relation to:

- use of performance injunctions, and
- number and use of section 100 orders.

A formal review will occur within five years of commencement for the reforms that are progressed. Ongoing monitoring through annual reports, system logs, and post-merger reviews will support comprehensive stewardship. The independent review of the Commission's governance, that reported in May 2025, may inform further improvements.

Limitations and constraints on analysis

The analysis is constrained by limits on the scope of reforms set by Cabinet, which focused on targeted improvements to merger settings, anti-competitive conduct, and a potential pro-competition rule-making power. The options presented are therefore limited to retaining the status quo and targeted legislative changes to strengthen existing merger control, conduct, collaboration and enforcement provisions. In addition, there are gaps in domestic enforcement precedent on anti-competitive coordination, which make it difficult to assess the effectiveness of the current law and whether legislative change is necessary.

The proposal to introduce a specific prohibition on predatory pricing was added very late in the policy development process and was not directly consulted on. This limits the ability to assess stakeholder views or potential implementation impacts with the same level of confidence as other proposals.

While stakeholder feedback and international best practice provide strong qualitative support for the proposed changes, we were not able to precisely estimate the likely resource costs to the Commission. These will depend on how frequently the new tools are used and the complexity of each case. This also reflects the nature of competition policy, where impacts are long-term and system wide. This uncertainty has been noted as a limitation. Nevertheless, qualitative assessments strongly support the view that benefits materially outweigh costs.

I have read the Regulatory Impact Statement and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.

Responsible Manager(s) signature:

Catherine Montague
Manager, Competition Policy
14/08/2025

Quality Assurance Statement	
Reviewing Agency: MBIE and Ministry for Regulation	**QA rating:** Partially Meets
Panel Comment: A quality assurance panel with representatives from the Ministry of Business, Innovation and Employment and the Ministry for Regulation has reviewed the Regulatory Impact Statement and consider that overall, it partially meets the quality assurance criteria. While issues 1 to 6 meet the criteria, in relation to issue 7 (predatory pricing) no consultation has been conducted as the proposal was introduced late in the policy process.	

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. New Zealand's economy relies heavily on open, competitive markets to drive productivity, innovation and fair prices. However, there is growing evidence that competition is weakening across a range of sectors. Market studies, academic research, and business feedback point to a steady rise in market concentration, and low rates of new business entry, which contribute to sluggish productivity. When competition falters, dominant firms can entrench their position, innovation slows, and consumers and small businesses face higher prices and fewer choices.

2. A 2016 MBIE study assessing over 300 industries using a 'profit elasticity' measure found signs of weak competition particularly in banking, agriculture, forestry, fishing, finance and insurance, and wholesale trade.[6] 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.[7] 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. In such markets, exclusionary pricing strategies - especially by firms with substantial market power - can further suppress entry and reinforce concentration.

3. Australia has faced similar challenges with concentrated markets and weak competition, particularly in sectors like franchising, agriculture, and energy. In response, it introduced a flexible regulatory tool under the Competition and Consumer Act 2010 (**CCA**) that allows for the creation of enforceable industry codes of conduct. These codes are designed to address harmful conduct and power imbalances without requiring primary legislation, offering a more agile and targeted policy response. The Australian model provides a useful precedent for how New Zealand might strengthen its own competition framework through delegated rule-making powers.

4. Similar concerns have emerged globally, with jurisdictions like Australia, the United Kingdom, and the European Union recently reviewing their competition laws to respond to digital disruption, growing concentration, and the increasing complexity of market conduct. For a small, remote economy like New Zealand, weak competition has a more pronounced effect. We have fewer players in many markets to begin with, making the risk of entrenched market power more acute.

5. The 2024 OECD Economic Survey of New Zealand highlighted these risks and recommended strengthening competition policy and enforcement as a key lever to support productivity growth. The report emphasised the need for clearer, faster competition tools and greater alignment with international peers – particularly Australia, where reforms are already underway. The OECD also noted that clearer rules around exclusionary conduct,

[6] MBIE, Competition in New Zealand Industries.
[7] OECD, OECD Economic Surveys: New Zealand 2024 (EN).

including predatory pricing, are essential to improving market contestability and protecting innovation.

6. The Commerce Act is New Zealand primary competition law and seeks to promote competition in markets for the long-term benefit of consumers. The Commission is responsible for enforcing the Commerce Act. The Commerce Act sets out the generic competition settings that apply to anti-competitive conduct (Part 2), mergers and acquisitions (Part 3) and the Commissions clearance and authorisation processes (Part 5), all of which are the focus of this review.

7. While the Commerce Act plays a central role in New Zealand's competition regime, it is only one part of the picture. Market studies and wider analysis have consistently found that key barriers to effective competition include regulatory entry barriers (such as the Resource Management Act 1991 (**RMA**), building regulations, and banking prudential rules), and missing infrastructure (such as open banking). These are being addressed through parallel reform efforts in other regulatory systems. However, there are still material weaknesses in the Commerce Act itself – particularly in its merger, conduct, and enforcement settings – that contribute to weak competition outcomes and need to be addressed through legislative change.

What is the policy problem?

8. The Commerce Act has not kept pace with how markets are evolving. The underlying architecture of our competition law was built for a different era – one with slower market change, more traditional business models, and simpler pricing and supply arrangements. While the Commerce Act has been updated in specific areas over time, many of its core tools – including enforcement powers and protections for confidential information - have remained unchanged for decades. This has made it difficult to address modern forms of exclusionary conduct, especially predatory pricing, which often rely on complex pricing strategies and cross-subsidisation across product lines or regions.

9. The scale of the competition problem is material and growing. According to the 2024 OECD Economic Survey of New Zealand, weak competition is one of the key structural factors dragging on productivity – New Zealand's multi-factor productivity growth has averaged just 0.2% annually since 2000, compared to 0.8% across the OECD. The Commission's market studies across fuel, groceries, and building supplies have found persistent issues: high margins, limited entry, and subdued innovation. For example, the grocery market study found the two dominant firms earn returns on capital 30-40% higher than their cost of capital, suggesting entrenched market power. Similar patterns exist in building supplies, where rebates and exclusive arrangements have limited entry and driven up costs. In each case, pricing strategies that may suppress competition - such as sustained below-cost pricing - have been raised as concerns but remain difficult to challenge under current law.

10. While multiple systems contribute to weak competition outcomes, the Commerce Act plays a central role – particularly in markets without bespoke regulation. Its limitations are directly implicated in poor outcomes identified by the Commission:

a. Groceries: The Commission found average returns on capital of 12.8-13.4%, well above the cost of capital (7.7%), indicating sustained market power. Foodstuffs and Woolworths NZ together account for over 90% of main grocery shopping, making New Zealand's grocery market one of the most concentrated in the world. The Commission found widespread use of land covenants, opaque pricing practices, restrictive rebates, and contract terms that deter entry and harm suppliers – yet many of these tactics fall outside current prohibitions. Suppliers are also often reluctant to speak out due to fear of retaliation.

b. Fuel: The Commission found importer margins rose by 80% between 2008 and 2017 but was unable to intervene due to limits in the Commerce Act. Key concerns – like vertical integration and exclusionary wholesale pricing – sat outside section 36 or required evidence that was too hard to obtain.

c. Building supplies: Fletcher Building's wallboard brand (GIB) has about 95% of the plasterboard market, and rebates and exclusivity deter new entrants, but many of these practices fall outside current prohibitions. While the Commission has since taken action under s 27, this was slow and reactive.

11. In each case, the Commission identified harmful conduct or entrenched market power but lacked adequate statutory tools to intervene. These gaps are not incidental, and represent a material share of the overall competition problem in New Zealand.

12. Recognising these challenges, the Government undertook a targeted review of the Commerce Act, focusing on areas with the strongest evidence of harm and the clearest opportunity to modernise our approach. Through this review, several key problems were identified that limit the Commerce Act's effectiveness in promoting competition, namely:

    a. Limited ability to address acquisitions that entrench market power but fall outside current merger review processes (further detail is set out on pages 35 – 36):

        i. Since 2008, the Commission has declined only 11 out of 176 merger clearance applications (an approval rate of over 93%). From 2018 to 2025, only two mergers were declined (97.5% approval rate). These statistics indicate a risk of "false negatives" – mergers that were cleared or not reviewed but have subsequently reduced competition. For example, adverse competition impacts were reported shortly after the clearance in 2024 of NZ Post's acquisition of courier business assets of PBT Group Limited.

        ii. Roll-up strategies have also been observed in New Zealand sectors such as veterinary services, where a corporate group has acquired over 40 individual veterinary clinics in just a few years. Similar patterns have emerged in the car parking sector, where Wilson Parking has progressively acquired a significant number of car park operations in major cities, with prices often increasing following consolidation.

    b. Regulatory barriers and uncertainty that discourage beneficial collaboration (further detail is set out on pages 15-16):

i. Since the collaborative activity clearance regime was introduced in 2017, only one collaborative activity clearance application has been filed – and it was declined – indicating that the current settings are too narrow, complex, or uncertain to support legitimate collaboration.

ii. For example, the New Zealand Banking Association (**NZBA**) proposed a joint anti-scam initiative but faced legal uncertainty over information sharing, deterring coordinated action. Similarly, a collective of performers in Wellington was blocked from negotiating fairer terms due to the high cost and complexity of the clearance process.

c. Reliance on slow, sector-specific legislation to address systemic issues (further detail is set out on pages 55 – 56):

i. Recent reforms like the Fuel Industry Act 2020 and the Grocery Industry Competition Act 2023 illustrated that systematic competition problems are often addressed through bespoke legislation only after substantial harm has occurred. These laws were introduced years after it became clear that these sectors suffered from entrenched market power and weak competition.

ii. In sectors like air transport and digital services, competition issues have arisen from conduct that does not clearly breach the Commerce Act but still deters entry or weakens rivals – such as strategic capacity increases or limiting access to essential data (see examples on page 56-57). These behaviours can have serious impacts on market dynamics yet fall through the cracks of existing enforcement tools.

d. Gaps in the Commission's ability to take timely action or protection sensitive information in mergers and investigations (further detail is set out on pages 27 – 28):

i. The Commission's effectiveness is materially constrained by the lack of statutory protections for confidential information. In a recent merger case, 25 suppliers declined to engage with the Commission due to concerns about the OIA. Businesses fear retaliation or misuse of their information, and staff report that even when information is provided, it is often hedged or incomplete. These limitations have delayed investigations, weakened the evidence base for enforcement, and deterred whistleblowers.

13. These issues create three core risks:

a. Entrenched market power – where competition problems go unaddressed or are difficult to prevent under current rules, particularly in concentrated markets.

b. Missed opportunities to promote competition – where the regime lacks flexible tools to support pro-competitive initiatives or business collaboration.

c. Growing misalignment with international best practice – including weak confidentiality protections that make it harder for the Commission to obtain and use sensitive information, undermining enforcement.

14. These problems are structural, not just operational. Without reform, the regime risks becoming increasingly reactive and fragmented, reliant on delayed interventions that struggle to keep pace with market change. Modernising the Commerce Act – including clearer rules on exclusionary conduct such as predatory pricing – is essential to restoring competitive pressure, supporting new entry, and aligning New Zealand's regime with international standards.

Why does it need to be addressed now?

15. The Government has signalled that strengthening competition is a key economic priority. This review is deliberately targeted at the front-end settings of the Commerce Act: the rules that determine when interventions are triggered, what conduct is allowed or prohibited, and how the regime supports competitive market dynamics.

16. The focus reflects both the urgency of the competition problems we face and the need to be practical about the scope of reform. Other parts of the regime – such as sector-specific regulatory regimes, the appeals and judicial review framework, or the design of the Commission's market study function – may warrant review in future, but are not currently generating the same level of concern or reform momentum. The areas in scope are those with the strongest evidence of harm and the clearest opportunity to modernise our approach.

Justification for government intervention

17. Government intervention is required to address persistent market failures in structurally uncompetitive and highly concentrated markets in New Zealand. The 2024 OECD Economic Survey of New Zealand identified various indicators of weak competition, including high prices, excessive profits, high vertical integration, weak product innovation, poor corporate performance, and stubbornly high market shares of incumbents. The OECD concluded that insufficient competition is a significant contributor to New Zealand's low productivity remaining "markedly below the OECD frontier". Voluntary action by firms is unlikely to resolve these issues, as dominant firms benefit from the status quo and have limited incentives to support change.

18. The OECD has recommended a gradual escalation of intervention, from removing barriers to entry to implementing structural remedies such as merger review and even the break-up of dominant firms where justified. These recommendations align with recent Australian reforms, which has seen the introduction of mandatory notification thresholds and enhanced tools to address creeping and killer acquisitions. Greater trans-Tasman alignment (where appropriate), reduces compliance costs, improves business certainty, and promotes a more integrated and competitive Single Economic Market.

19. The current legislative framework is outdated, inconsistently applied, and lacks the precision and agility required for effective enforcement. Key deficiencies include gaps in enforcement powers, the absence of statutory timelines for decision-making and inadequate protection of confidential information, all of which contribute to delays, uncertainty and reduced deterrence.

20. Government action is now needed to modernise and strengthen the regime so it can operate as a credible and responsible system of oversight. While some of the proposed changes involve new powers or restrictions, these are proportional to the scale of the problem and designed to preserve regulatory flexibility and business certainty. Safeguards are proposed to limit overreach, and consultation obligations will ensure that decisions reflect the perspectives of affected industries.

21. Addressing these issues now will help reduce reliance on costly sector-specific interventions and better equip the Commission to support vibrant, dynamic markets. Strengthened competition will also support wider economic objectives, including lifting productivity, easing cost of living pressures and promoting innovation.

What objectives are sought in relation to the policy problem?

22. The overarching objective of the review is to ensure that New Zealand's competition law framework is effective, modern, and able to promote competition in concentrated markets, support business decision-making, and enable timely, robust enforcement. The specific objectives are set out below.

23. **Promote business certainty:** Businesses should be able to understand how the Commerce Act applies to their commercial decisions and plan accordingly. The regime should provide clear rules, predictable outcomes and transparent processes. The Commerce Act should also facilitate collaboration between businesses where arrangements generate public benefits and do not materially harm competition.

24. **Support timeliness and transparency:** Competition enforcement and merger clearance must be timely, transparent and cost-effective. Delays and uncertainty undermine commercial investment and innovation, and opaque processes reduce confidence in regulatory decisions.

25. **Prevent the build-up of market power over time:** The regime should enable early and effective intervention to stop mergers that incrementally entrench market dominance, including creeping and killer acquisitions. This also involves equipping the Commission with appropriate powers to act where acquisitions are not notified but raise competition concerns.

26. **Enable more effective interventions to promote competition:** The Commission should be able to take action to address specific competition problems as they arise. This includes having access to the information needed to investigate and enforce the law effectively.

What consultation has been undertaken?

27. On 25 September 2024, Cabinet Economic Policy Committee (**ECO**) agreed to conduct a targeted review of the economy-wide competition settings set out in the Commerce Act [ECO-24-MIN-0206]. MBIE held public consultation from 5 December 2024 to 17 February 2025 and received 55 submissions.

28. In addition to public consultation, MBIE undertook targeted consultation with a wide range of stakeholders, including businesses, economists and law firms. MBIE also carried out

targeted consultation with competition regulators, policy officials and experts from Australia, Canada, the United Kingdom and the United States to ensure alignment with international best practice where appropriate.

Section 2: Assessing options to address the policy problem

What criteria will be used to compare options to the status quo?

29. The following assessment criteria, as set out in the *Promoting Competition in New Zealand: Targeted Review of the Commerce Act 1986* discussion document, are used to evaluate the policy options and all are weighted equally.

30. **Effectiveness**: The option should promote competition for the long-term benefit of consumers.

31. **Practicality**: The cost and simplicity of the policy option.

32. **Certainty**: The potential for the policy option to allow stakeholders to predict how regulation will apply, so they can prepare for how regulation might affect them.

33. **Flexibility:** The extent to which the option allows the regime to adapt to changes in markets.

34. **Regulatory efficiency**: The extent to which the option enables the regime to provide appropriate levels of regulatory scrutiny while minimizing regulatory burden.

What scope will options be considered within?

35. The scope of this review is limited to the matters that were consulted on in the discussion document *Promoting Competition in New Zealand: Targeted Review of the Commerce Act 1986* and to the general policy direction agreed upon by Cabinet on 25 September 2024, where ECO agreed to review New Zealand's economy-wide competition settings as set out in the Commerce Act [ECO-24-MIN-0206 refers], focusing on:

    a. merger settings;

    b. tools to address anti-competitive behaviour and provide more certainty to firms on what constitutes anti-competitive conduct;

    c. a potential pro-competition rule-making power as a flexible tool to remedy market failure.

36. The issues consulted on were deliberated targeted to focus on discrete areas where there was evidence of longstanding concerns or gaps relative to international best practice, and where there was an identified opportunity to strengthen the Commerce Act to better promote competition in New Zealand markets.

37. The review has not considered the overall structure of the Commerce Act, nor has it proposed more fundamental reforms, such as the introduction of a mandatory notification regime or other measures that would significantly expand the Commission's functions beyond those consulted on. The options presented are therefore limited to retaining the

status quo and targeted legislative changes to strengthen existing merger control, conduct, collaboration and enforcement provisions.

What options are being considered?

38. The options considered in this RIS are grouped under seven key issues. The Minister of Commerce and Consumer Affairs is looking to progress policy reforms in two tranches. Tranche 1 Cabinet policy decisions included:

    a. Supporting beneficial collaboration

    b. Court injunctions, and

    c. Protecting confidential information.

39. Tranche 2 Cabinet policy decisions are being sought now, and include:

    a. Enhancing the merger regime

    b. Deterring anti-competitive conduct,

    c. Introducing pro-competition rules, and

    d. Clarifying the prohibition against predatory pricing.

Issue 1: Supporting beneficial collaboration

40. While the Commerce Act provides pathways for businesses to collaborate, the current framework creates unnecessary uncertainty, cost, and delay for arrangements that are likely to be pro-competitive or deliver public benefits. Firms are deterred from pursuing worthwhile initiatives as they can only obtain certainty by applying for clearance or authorisation, at significant cost and without any guarantee of outcome. This has affected projects with broader economic and social benefits, such as collective bargaining for small firms and environmental collaboration.

41. A notable example is the banking sector's efforts to combat the rising incidence of scams. In 2023, New Zealanders lost nearly $200 million to scams, promoting the NZBA to propose the establishment of a coordinate Anti-Scam Centre. However, banks have expressed concerns that current competition law settings create uncertainty and compliance risks, particularly when considering information sharing and joint initiatives that could be regarded as anti-competitive. The NZBA has requested government support to remove regulatory barriers to enable effective collaboration in scam prevention efforts.

42. Similarly, the ACC has identified limitations in the Commerce Act that impede collaborative efforts with other health sector agencies. While ACC has a limited statutory exemption under section 305 of the Accident Compensation Act 2001 for joint purchasing of emergency transport services with Health New Zealand, other potential collaborative activities are restricted. The ACC has indicated that the current competition law settings constrain collaborative commissioning, funding, and contracting, which could otherwise improve outcomes and reduce costs across the health ecosystem.

43. The current framework also affects smaller groups seeking to coordinate for practical reasons rather than to reduce competition. For example, the Fired Up Stilettos collective – a group of 19 independent performers at a Wellington nightclub – sought to work together to negotiate more transparent and consistent terms with the venue. While their conduct likely breached the Commerce Act's prohibition on cartel behaviour, the collaboration was not aimed at distorting the market or excluding rivals, but rather at improving transparency and predictability in their working arrangements. Authorisation was technically available to them under the Commerce Act, but the cost and complexity of the process (particularly the $36,800 application fee) made it inaccessible.

44. In other words, the existing legal framework may inadvertently stifle beneficial collaboration that could lead to improved consumer protections and public services. Stakeholders have consequently called for clearer and more streamlined processes to better facilitate beneficial, low-risk collaboration.

Stakeholder perspectives

45. Most submitters agreed the current beneficial collaboration regime creates uncertainty for businesses seeking to collaborate. Some legal and economic experts favoured clear safe harbours or a more robust notification regime to reduce unnecessary deterrence of valuable collaboration. Submitters supported improvements to simplify the collaborative activity clearance process and remove barriers for small businesses, including reconsidering the $36,800 fee. Several submissions favoured a more facilitative approach overall, through safe harbours, clear guidance, and targeted changes to better enable pro-competitive collaboration.

What options are being considered?

Option One – Status quo

46. While the Commerce Act provides mechanisms to support beneficial collaboration, such as clearance and authorisation pathways, stakeholders have expressed that these are not working well in practice. Self-assessment is difficult as there have been no decided Court cases, and only one decided application for clearance. Submitters noted that while the Commission offers an 'open door' for feedback, the current legislative design – particularly the per se nature of the cartel prohibition and the criminal offence risk – continues to deter legitimate collaborations.

47. The current framework imposes high costs and legal uncertainty for firms seeking to engage in pro-competitive or public-benefit collaborations. Submitters gave examples of industry-wide sustainability initiatives and anti-scam efforts, that were chilled or delayed due to legal uncertainty. In particular, the $36,800 application fee is seen as a major barrier for small firms.

48. There is also no low-cost pathway for seeking reassurance on proposed conduct that may technically breach the Commerce Act but is unlikely to lessen competition. Firms wanting

to collectively bargain,[8] engage in Resale Price Maintenance,[9] or engage in industry health or environmental schemes,[10] will continue to require authorisation to comply with the Commerce Act. The Commission receives significantly fewer authorisation applications than Australia,[11] which suggests there is some activity that is either being discouraged or occurring without approval.

49. Submitters highlighted that although the Commerce Act technically provides mechanisms to support collaboration, in practice these are difficult to assess and can deter beneficial conduct, particularly where criminal penalties apply, or the collaborative activity does not clearly fall within an exception. Some noted that the Commission's approach to the "reasonably necessary" test is overly strict and discourages genuine, pro-competitive collaborations.

Option Two – Introducing a more accessible and flexible framework (MBIE and Minister preferred)

50. This option would amend the Commerce Act to enable a more accessible and fit-for-purpose framework for facilitating beneficial collaboration, while retaining core protections against anti-competitive conduct. The aim is to reduce regulatory barriers for collaborations that are unlikely to lessen competition and may in fact deliver substantial public or economic benefits, such as collection action on scams, climate goals, or small business collective bargaining. These reforms respond directly to concerns raised by stakeholders regarding the lack of proportionate, low-cost mechanisms to enable businesses to gain legal certainty about collaborative arrangements.

51. A key element of this reform is the introduction of a statutory notification regime, modelled on Australia's approach. The proposed regime would allow businesses to notify the Commission of a proposed collaborative arrangement. If the Commission does not raise concerns within a specified period, the collaboration is deemed lawful for the duration of the notification, providing legal certainty to participants at significantly lower cost and complexity than a full authorisation process. Submitters generally supported a statutory notification tool, provided it did not become a blanket requirement and could be used voluntarily. Several submitters recommended clear guidance on when notification is appropriate and the type of conduct likely to benefit from positive engagement with the Commission.

52. To complement the notification regime, the Commission would be empowered to issue class exemptions for certain categories of collaborative activity that either pose minimal competition risk or clearly result in net public benefit (for example, small business collective bargaining). Class exemptions would be subject to terms and conditions, and the Commission would retain the ability to review or revoke them as market conditions

[8] For example, News Publishers' Association of New Zealand Incorporated [2022] NZCC 35, The New Zealand Tegel Growers Association Incorporated [2022] NZCC 30
[9] HP New Zealand Ltd [2021] NZCC 14
[10] Infant Nutrition Council [2023] 42, Refrigerant License Trust Board, Decision 735, 25 November 2011
[11] See the publicly available registers at https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers and https://comcom.govt.nz/case-register.

evolve. This reform reflects both stakeholder support for targeted safe harbours and successful implementation in jurisdictions such as Australia, where class exemptions have enabled over 100 collective bargaining groups to negotiate without regulatory delay.

53. In addition to these structural changes, the Commission would be given explicit discretion to waive or reduce filing fees in appropriate cases. This recognises that the high fixed cost of authorisation applications can deter beneficial collaboration, especially for smaller firms or for initiatives that primarily benefit the public and do not generate significant financial benefits for industry. Allowing the Commission to offer targeted relief could remove a key barrier to entry for these parties and make the regime more accessible.

54. The preferred option also involves simplifying the collaborative activity clearance process. Currently, the Commission must assess whether any cartel provision in the proposed collaboration is "reasonably necessary" to achieve the collaboration's purpose, and whether the collaboration is likely to substantially lessen competition under section 27. Under the proposed change, businesses could decide to self-assess under section 27. If this was requested, the Commission would only be required to assess whether the collaboration qualifies as a bona fide collaborative activity and whether any cartel provisions are reasonably necessary. A few submitters advocated for simplifying this test on the basis that the current dual test adds unnecessary complexity and reduces incentives to engage with the Commission.

55. The Commission will still be able to take action under s 27 if it believes the agreement is likely to substantially lessen competition and will in fact 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.

56. Finally, the reforms would enable the Commission to grant clearance for collaborative arrangements involving changing members over time. This reflects the practical reality that many public-good or cross-sector collaborations evolve over years and require flexibility to accommodate new or leaving participants. The Commission would also be able to specify the duration for which such clearances apply, improving legal certainty. This change responds to stakeholder calls for the Commission to be more responsive to collaborative arrangements that evolve over time.

Issue 1: Supporting beneficial collaboration

	Option One – Status quo	Option Two – Introduce a more accessible and flexible framework
Effectiveness	0 Existing processes enable beneficial collaboration in theory, but they are not widely used in practice due to cost and complexity.	+1 The proposed reforms directly address barriers and provide new, tailored tools to facilitate collaboration, particularly in areas of public benefit.
Practicality	0 The current regime is complex, uncertain, and costly.	+1 The proposed changes would make the beneficial collaboration regime more accessible and fit-for-purpose. Similar changes have worked well in Australia.
Certainty	0 Businesses face uncertainty about whether proposed collaborations will be deemed lawful, as the current processes are complex and costly.	+2 Notification and class exemption regimes provide clear, predictable pathways and significantly increase certainty. Streamlined process for collaborative activity clearances increases certainty.
Flexibility	0 The existing regime is rigid and not suited for dynamic or evolving collaborations, or small businesses.	+2 Accommodates flexible participation and flexibility of oversight of higher- and lower-risk conduct and provides flexible and accessible processes that suit a range of collaboration types.
Regulatory efficiency	0 Costly, resource-intensive process for all cases.	+ 1 Enables the Commission to allocate resources more efficiently by focusing formal review on high-risk or borderline cases.
Overall assessment	0	+ 7

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

57. The preferred option is to reform the Commerce Act to introduce a notification regime, class exemptions, fee flexibility, and process improvements to better support beneficial collaboration. This option is expected to reduce deterrents to pro-competitive cooperation, strengthen certainty for business, and unlock collaborations with material public benefit.

58. This reform would particularly benefit small businesses, not-for-profits, regional or rural groups, and sectors undertaking joint action on systemic issues such as digital fraud or decarbonisation. Under the preferred option, such projects could proceed with greater confidence, transparency, and oversight.

59. The Commission's experience during COVID-19 demonstrated that collaboration can be rapid, efficient and beneficial when regulatory tools are appropriately tailored. The reforms would embed those lessons in the Commerce Act on a permanent basis and enable the Commission to play a more constructive role in facilitating beneficial cooperation.

60. While there may be some initial uncertainty about how these new tools will operate, particularly around the boundaries of class exemptions or notification decisions, this will reduce over time as the Commission develops guidance and precedent. These tools are not novel (Australia has operated a similar regime successfully for many years) and the design features for New Zealand are well-calibrated for our smaller market. This package of reforms is also consistent with international best practice, aligns with OECD recommendations, and directly supports broader government priorities such as productivity growth, resilience and consumer welfare.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Compliance costs would be significantly lower than those under the current authorisation regime.	Non-monetised, low	High – stakeholder feedback supports this assessment and evidence from Australia suggests administrative burdens under similar regimes are minimal.
Regulators	The Commission will need to reallocate existing resources	Non-monetised, medium	High – based on the experience of the

	to develop and administer a statutory notification and class exemption regime, although this will at least partially be covered by an application fee. While these functions will impose additional workload, they are expected to be significantly less resource-intensive than a full authorisation process. Over time, the reforms are expected to reduce pressure on the Commission by streamlining the handling of low-risk collaboration.		ACCC, where similar reforms have been successfully implemented. MBIE intends to engage further with the ACCC to inform operational expectations.
Others	There is a theoretical risk that some firms may use the notification regime to shield conduct that does in fact lessen competition. However, the Commission's ability to object and its residual enforcement powers under section 27 remain intact, and risk mitigation can be supported by strong guidance and early precedent.	Non-monetised, low	Medium – no significant stakeholder concerns raised in consultation.
Total monetised costs		**Low – medium**	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Greater certainty, lower costs, and faster pathways for businesses to engage in	Non-monetised, medium	High – strong support from submitters and consistent with experience in Australia.

	beneficial collaborative activity.		
Regulators	Greater ability to allocate resources proportionately. Low-risk collaborations can be managed through streamlined pathways, freeing capacity for complex or high-risk transactions	Non-monetised, medium	High – strong support from submitters and consistent with experience in Australia.
Others	Over time, reforms are expected to support public-interest collaborations, including those addressing scams, sustainability, or resilience.	Non-monetised, high	Medium – impact inferred from economic literature, experience in comparable jurisdictions, and the nature of collaborations currently deterred under the status quo.
Total monetised benefits		**Medium – high**	
Others	Reducing reliance on primary legislative reform would lower public resource demands. Long-term benefits include stronger competition, lower prices, improved produce and service quality, and greater innovation.	Non-monetised, high	Medium – supported by submissions, OECD guidance on regulatory agility, and international evidence that improving competition leads to lower prices and innovation gains over time.
Non-monetised benefits		**Medium – high**	

Issue 2: Court injunctions

61. The current court injunction provisions in the Commerce Act only allow the courts to restrain harmful conduct, and do not allow courts to order firms to take corrective action. This limits the ability to fully remedy competition harm, particularly where restraining future conduct alone is insufficient to restore market conditions. The lack of performance injunctions also creates inconsistencies with other legislation the Commission is responsible for and weakens the Commission's ability to enforce the Commerce Act.

62. The need for reform is particularly pressing in digital markets. Feedback from stakeholders, such as the Coalition for App Fairness, highlighted how large digital platforms can entrench their market power through conduct like self-preferencing and discriminatory access terms. In such cases, mandatory corrective orders may be necessary to protect smaller competitors and consumers.

63. Many stakeholders supported modernising the Commission's injunction powers to allow for performance-based remedies, aligning with other sectoral regimes and improving the Commission's ability to respond swiftly to competition issues.

Option One – Status quo

64. Retaining the status quo would preserve the ability of courts to issue restraining injunctions against individuals and firms that breach, or are likely to breach, the Commerce Act. This allows courts to prevent future unlawful conduct but does not enable them to require positive steps to remedy the harm caused by a contravention.

65. While this approach offers a basic level of deterrence, it limits the ability of courts and the Commission to restore competition where markets have already been distorted. This risk is particularly acute in digital markets, where entrenched market power can persist even if the offending behaviour is restrained. Without the ability to mandate corrective actions (such as ordering fair access to a platform), enforcement efforts may fail.

Option Two – Providing for performance injunctions (MBIE & Minister preferred)

66. Option two would modernise the court injunction powers under the Commerce Act to allow the courts to grant both restraining and performance injunctions. This would permit courts, on application by the Commission or another person, to require firms to take positive steps to correct anti-competitive harm.

67. In digital markets, where market dominance can be rapidly entrenched, the ability to impose obligations would be particularly helpful. Stakeholders such as the Coalition for App Fairness emphasised that mandatory correct measures (such as prevent self-preferencing) may be necessary to restore healthy competition.

68. Expanding the court's powers would also enhance the effectiveness of the Commission's enforcement, support business compliance, and bring New Zealand's approach closer to Australia, where the ACCC can already seek performance injunctions under the Competition and Consumer Act 2010.

Issue 2: Court injunctions

	Option One – Status quo	Option Two – Provide for performance injunctions
Effectiveness	0 Courts can restrain anti-competitive conduct, but the regime is outdated and cannot mandate corrective action.	+1 Updating the Commerce Act would allow courts to impose performance injunctions, promoting more effective remedies and protecting competition.
Practicality	0 The regime is simple but limits the remedies available to the court to address harm.	-1 Performance injunctions may require ongoing court oversight, increasing enforcement costs and complexity.
Certainty	0 Existing court powers are familiar but do not provide clear remedies to restore competition once harm has occurred.	+1 Modernising the Commerce Act would increase certainty, consistency, and transparency by aligning with other regulatory regimes the Commission is responsible for.
Flexibility	0 The court can only restrain future conduct, limiting its ability to fully respond to breaches, especially in digital markets.	+1 Extending available tools would increase flexibility for the courts and Commission to achieve effective outcomes.
Regulatory efficiency	0 The current regime cannot always restore competition without resorting to complex enforcement workarounds.	+1 Allowing performance injunctions would reduce long-term enforcement costs by providing clearer, more direct remedies.
Overall assessment	0	+3

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

69. The preferred option – amending the Commerce Act to enable courts to grant both restraining and performance injunctions – is expected to best address the problem, meet the policy objectives, and deliver the highest net benefits. The preferred option would primarily affect courts, the Commission, and regulated businesses subject to injunctions. It would support stronger oversight, reduce the risk that anti-competitive behaviour persists unaddressed, and deliver benefits to consumers through more dynamic, competitive markets.

70. There is a risk that managing ongoing performance obligations could increase time and resource demand for the courts and the Commission, and that the courts could impose inappropriate performance injunctions. However, these risks are manageable, and the option aligns with enforcement settings in Australia. The preferred option would modernise the enforcement framework, deliver a more effective competition regime, and support better outcomes for consumers over time.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Firms subject to injunctions may face additional costs due to ongoing monitoring.	Non-monetised, low	Medium – support in submissions for extending enforcement tools but acknowledging costs will vary depending on firm behaviour.
Regulators	The Commission would need to manage more complex injunctions process within existing resources.	Non-monetised, medium	Medium – submissions noted that extending the enforcement toolkit could increase complexity, but no additional funding would be required.
Others	No significant additional costs.	Non-monetised, low	Medium – no material concerns raised during consultation.

Non-monetised costs		**Low – medium**	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Stronger regulatory oversight, improved certainty, and more effective enforcement.	Non-monetised, medium	Medium – many submissions highlighted the need for more effective enforcement tools.
Regulators	More flexible and targeted enforcement options would improve the Commission's ability to support competition.	Non-monetised, medium	Medium – the Commission already can issue performance injunctions under other regulatory regimes (including the Telecommunications Act 2001 and Retail Payment System Act 2022).
Others	Reduced risk of anti-competitive behaviour, encouraging innovation and improved outcomes for consumers.	Non-monetised, medium	Medium – supported by stakeholder feedback, experience in other regulatory regimes, and consistent with broader economic principles favouring competitive markets.
Non-monetised benefits		**Medium**	

Issue 3: Protecting confidential information

71. All documents and information held by the Commission are subject to the OIA. Submissions and Commission advice has highlighted that the current application of the OIA is creating significant reluctance among businesses and individuals to provide sensitive or commercially confidential information to the Commission, due to fears that it may be disclosed. Businesses are concerned that commercially sensitive material could be accessed by competitors, while whistleblowers and complainants are concerned about the risk retaliation if their identity is disclosed.

72. In several recent merger cases, third parties explicitly declined to engage or withdrew cooperation once they were informed of the OIA regime. In a recent merger, at least 25 suppliers cited the OIA as their reason for refusing to speak to the Commission. In another, an anonymous employee who initially intended to provide a submission disengaged entirely after receiving the Commission's standard OIA statement. In another, a competitor that had originally agreed to be interviewed later declined to speak further after being told about the OIA regime. According to Commission staff, these outcomes are common, especially when parties fear commercial retaliation. This undermines the Commission's ability to collect full and balanced evidence.

73. In addition to deterring third-party input, there is growing concern that the OIA is being used strategically to assess confidential submissions, particularly in merger proceedings. The Commission is required to apply a public interest balancing test before withholding information, which must be repeated for each request, even where the information is plainly sensitive, or the case is ongoing. In a recent merger, a competitor delayed their meeting with the Commission and later requested confidentiality after learning that the applicant had made an OIA request for their submission. In another, several key evidence sources declined to answer questions or provide documents after the Commission explained the OIA's application.

74. Even where the Commission successfully obtains information, staff frequently observe that interviewees hedge their responses or withhold critical details until they receive reassurance that these views will not be shared. These effects are particularly problematic in merger assessments, which are quasi-judicial and rely heavily on informal third-party cooperation. The reputational, commercial, and legal risks associated with unintended disclosure are simply too high for many to accept under the current framework. Over time, these disclosure risks compound, discouraging future participation and undermining the Commission's effectiveness as a regulator.

Stakeholder perspectives

75. Submissions from both businesses and law firms raised concerns about the Commission's handling of commercially sensitive information. We have heard through consultation that businesses are increasingly reluctant to provide information to the Commission due to concerns that commercially sensitive information will be provided to

competitors, and concerns by affected customers, suppliers or whistleblowers who might suffer retaliation if their information is disclosed.

Option One – Status quo

76. Under the status quo, the Commission applies the OIA every time it receives a request for information, including during ongoing merger investigations or enforcement work. This includes applying the public interest balancing test in section 9(1) of the OIA, even where information is clearly commercially sensitive or was provided voluntarily in confidence. The Commission informs parties at the outset that any information they provide may be subject to disclosure under the OIA. Submitters had mixed views on the adequacy of this approach. Many businesses highlighted that the Commission's limited discretion under the OIA has reduced trust and deterred third parties – particularly smaller firms or those in concentrated sectors – from sharing information due to the fear of disclosure or retaliation.

77. Once an OIA request is received, the Commission assesses whether the information can be withheld. This often involves a line-by-line analysis of documents, consultation with the original information provider, and legal assessment of the public interest in disclosure. This process applies even where the information is plainly sensitive, and the investigation is ongoing. The balancing test is time-consuming, legally uncertain and exposes the Commission to risk of error delay. In effect, the Commission has limited discretion to treat commercially sensitive information in merger or enforcement processes differently from routine administrative documents, raising questions about whether the current OIA regime is fit-for-purpose in this context. Concerns were raised by several law firms and industry groups about the high volume of OIA requests and the impact this has on participation in Commission process.

Option Two – Operational improvements to protect confidential information under the OIA

78. Under this option, the Commission would seek to improve the protection of confidential information through operational and process changes, without legislative amendment. This could involve the Commission working more closely with the Office of the Ombudsman to clarify approaches to withholding sensitive information under the OIA, adjusting its internal processes to apply a stronger presumption against disclosure where justified, and issuing updated public guidance to businesses to provide greater assurance that commercially sensitive material will be treated with care. This aligns with suggestions from submitters who recommended clearer statutory guidance and improved communication with information providers. The Commission would monitor the effectiveness of these changes and, if significant concerns persist, could revisit the case for legislative change supported by stronger evidence after a period of time.

79. This option would have the advantage of being quicker to implement and would avoid making any legislative changes that affect the OIA. It would also maintain flexibility for the Commission to adapt its practices over time. However, it would be less effective in providing certainty to businesses as there are limits on the extent to which concerns about

disclosure could be fully addressed without legislative change. Businesses are likely to remain hesitant to share critical information, limiting the Commission's ability to effectively carry out its functions. Although some submitters argued that operational changes could build confidence and reduce unnecessary disclosure without needing immediate legislative change, many submitters argued that operational fixes alone were insufficient to address the lack of trust in the current system.

80. While operational improvements may marginally improve confidence in the Commission's handling of confidential information, they cannot resolve the core issue: information provided to the Commission remains subject to potential disclosure under the OIA. Therefore, the Commission cannot guarantee that commercially sensitive or otherwise confidential information will not be released, if it is in the public interest to do so. This legal uncertainty undermines the willingness of businesses and individuals to share critical evidence – particularly in high-stakes merger reviews or investigations into powerful market players.

81. Many submitters also expressed concerns that existing protections were inadequate because they rely on case-by-case application of withholding grounds, subject to the Ombudsman's oversight. While the Commission can refine its internal processes and issue guidance, these changes do not provide the clear, enforceable assurance that many information providers seek. Businesses operating in highly competitive markets, or whistleblowers with personal risk, need full confidence that the information they provide will not be released. Without this assurance, many choose to withhold cooperation or limit what they share.

Option Three – Legislative reform to strengthen protections for confidential information (MBIE & Minister preferred)

82. The Commission currently has the power to issue confidentiality orders under section 100 of the Commerce Act where it considers it necessary or desirable to do so to protect the integrity of an investigation. These orders protect specific information or documents from being published, communicated, or given in evidence.

83. Option three would provide the Commission with greater legislative flexibility to refuse requests for confidential information under the OIA, would protect parties who provide information to the Commission from retaliation, and would give the Commission the ability to issue strengthened s 100 orders. This would improve business confidence when providing information to the Commission. It would also assist in preventing misuse of the system and enhance the Commission's ability to enforce the Commerce Act. This option responds to calls from the majority of submitters who supported strengthening the Commission's ability to protect confidential information, and concerns raised about the need to build confidence in the Commission's ability to protect sources.

84. Similar protections already exist for other economic regulators in New Zealand. For example, the Financial Markets Authority (FMA) (sections 59 and 60 of the Financial Markets Authority Act 2011) and the Reserve Bank (RBNZ) (section 269 of the Reserve Bank

of New Zealand Act 2021) have confidentiality protections that restrict disclosure of information collected in the course of their functions. It is unclear why the Commission – responsible for similarly sensitive and often commercially significant investigations – should not be afforded equivalent protection.

85. Furthermore, many overseas jurisdictions have stronger protections in place to safeguard confidential information gathered by competition regulators. In Australia, recent reforms provide that merger authorisation processes are fully exempt from disclosure under the Freedom of Information Act 1982. In the United Kingdom, the Freedom of Information Act 2000 includes specific exemptions for information obtained in confidence and for material disclosure in competition investigations. Singapore's Competition and Consumer Commission also has clear powers to protect information under its guidelines. These international examples were also cited by some submitters who considered New Zealand to offer comparatively weak protections. They supported changes to align the Commission's approach more closely with international practice.

86. MBIE considers that, to build durable trust and ensure the Commission can collect robust evidence, a legislative change is required to carve out a narrow but effective confidentiality regime. This would allow the Commission to receive and protect information under clearly defined conditions, subject to appropriate safeguards. Without this, efforts to address competition issues will continue to be constrained by partial evidence, limited cooperation, and ongoing reluctance from those most exposed to commercial harm.

87. The Ministry of Justice (MoJ) has indicated its discomfort with legislative exemptions to the OIA and would prefer to maintain the current legal framework, supplemented at most by procedural enhancements. Nevertheless, we consider there is a principled case for stronger protections, especially where the Commission is exercising significant investigative powers and where similar protections already exist for other financial regulators such as the RBNZ and FMA.

88. Initial conversations with the Office of the Ombudsman have also indicated a preference for non-legislative options to address concerns about protecting confidential information. Their starting point is that the OIA plays a fundamental role in ensuring government transparency and should not be amended lightly. They noted the OIA already provides grounds to withhold information subject to an obligation of confidence and suggested that further guidance or operational changes would be preferable to legislative reform. That said, they remain open to further engagement, and MBIE is continuing discussions to explore options. The Legislative Design and Advisory Committee (LDAC) is also reviewing the proposal to assess whether it strike the right balance between transparency and effective enforcement.

Issue 3: Protecting confidential information

	Option One – Status quo	Option Two – Operational improvements to strengthen confidentiality protections	Option Three – Legislative reform to strengthen confidentiality protections
Effectiveness	0 The Commission remains limited in its ability to protect commercially sensitive information, reducing business confidence and cooperation.	+1 Would improve protection of confidential information compared to the status quo, but businesses may still be hesitant to share confidential material.	+2 Would improve the Commission's ability to protect information and encourage greater disclosure.
Practicality	0 OIA requests require case-by-case assessments, even for clearly sensitive material.	+ 2 Can be implemented quickly, but relies on voluntary process changes and may lack durability.	+1 Would streamline information handling and improve efficiency.
Certainty	0 Businesses have limited certainty about how the Commission will treat confidential information under the OIA.	+1 Would provide some additional assurance to businesses, but no binding legal protections.	+2 Would give businesses certainty about how information will be used and disclosed.
Flexibility	0 Section 100 orders are limited to specific documents and cannot be tailored to broader scenarios.	+1 Allows for the Commission to use its discretion, but this will remain constrained by the current legal limits set by the OIA.	+ 2 The Commission could apply section 100 orders to types or classes of documents and attach conditions, significantly increasing flexibility.
Regulatory efficiency	0 Applying the full OIA public benefit balancing test to all documents is resource intensive and inefficient.	+1 No new regulatory burden, but the impact of improvements may be limited.	+2 Legislative clarity would streamline OIA responses and reduce resource demands over time.
Overall assessment	0	+ 6	+ 9

Note: Option three scores highest under the specified criteria, but this does not fully reflect broader trade-offs, nor the views of MoJ and the Office of the Ombudsman, and potential impacts on transparency and access to information under the OIA.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

89. The preferred option – strengthening the Commission's ability to protect confidential information – is expected to best address the problem, meet the policy objectives, and deliver the highest net benefits. A non-legislative option was also considered, involving improvements to the Commission's internal processes, closer engagement with the Ombudsman, and clearer guidance to businesses on how confidential information is treated. While this would offer some improvement over the status quo, it would not provide the same level of protections as a statutory change.

90. The reforms would primarily benefit businesses, suppliers, whistleblowers and other parties providing sensitive information to the Commission. Greater certainty about how commercially sensitive information will be treated would encourage more parties to come forward, improving the Commission's ability to identify and address anti-competitive conduct. Consumers would also ultimately benefit from stronger enforcement outcomes, supporting more competitive, innovative and resilient markets.

91. These changes would particularly support small businesses and complainants operating in concentrated or dynamic markets, who may otherwise be reluctant to report concerns due to fear of retaliation or disclosure of sensitive information. By providing clear upfront protections through section 100 orders and stronger withholding powers under the OIA, the preferred option would help level the playing field for smaller players and promote more effective enforcement. The non-legislative option may also assist by improving guidance and practices, but its impact will likely be more limited without enforceable protections.

92. While there may initially be some uncertainty about how the Commission will exercise its strengthened powers, including how section 100 orders are used, this risk is likely to be small and reduce over time as the Commission develops guidance and precedent. The Commission already has experience issuing section 100 orders, albeit in a limited form, and any additional administrative burden is expected to be minor and manageable within existing baselines. However, there may be some instances where information that would otherwise have been released under the OIA is withheld to protect commercially sensitive material, even if its disclosure may have been in the public interest. This trade-off is considered necessary to improve overall confidence in the Commission's handling of confidential information and encourage greater disclosure of anti-competitive conduct.

93. Many overseas jurisdictions have stronger protections in place to safeguard confidential information gathered by competition regulators. In Australia, recent reforms provide that merger authorisation processes are fully exempt from disclosure under the Freedom of Information Act 1982, recognising the need to protect commercially sensitive information during merger reviews. In the United Kingdom, the Freedom of Information Act 2000 includes specific exemptions for information obtained in confidence and for material disclosure in competition investigations. Singapore's Competition and Consumer Commission also has clear powers to protect information under its guidelines. In the

United States, the Freedom of Information Act includes Exemption 4, allowing the FTC to withhold commercially sensitive business information.

94. Strengthening New Zealand's framework would align the Commerce Act with international best practice, enhance the Commission's effectiveness, improve certainty and business confidence, and improve competition over time. While a non-legislative approach may be appropriate as an interim step, the preferred option provides a more robust and durable solution that would bring New Zealand into line with international best practice.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Firms subject to section 100 orders may face additional compliance obligations, particularly relating to conditions attached to orders. Clear and unambiguous conditions would help minimise this burden.	Non-monetised, low	Medium – assuming terms and conditions are clear and proportionate.
Regulators	The Commission would need to manage broader use of section 100 orders, but impacts are expected to be minimal as the Commission already issues section 100 orders within a limited scope.	Non-monetised, low	Medium – the Commission has existing capability, and any additional workload is expected to be manageable.
Others	Less information may be disclosed to third parties compared to the status quo, including in some cases where disclosure might otherwise be considered to be in the public interest. However, this is balanced by the greater confidence parties would have in providing sensitive information, and is thereby expected to encourage greater disclosure and improve enforcement.	Non-monetised, low	Medium – aligned with reforms in other jurisdictions (i.e. Australia), that have experienced similar issues.

Non-monetised costs		**Low**	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Businesses and individuals providing information to the Commission would have greater confidence that sensitive information will be protected, and greater clarity around disclosure risks.	Non-monetised, high	High – reflected strongly in stakeholder submissions, Commission advice, and Australian experience.
Regulators	The Commission would be able to protect commercially sensitive information more effectively, encouraging greater information sharing and improving its ability to fulfil its functions.	Non-monetised, high	High – reflected strongly in stakeholder submissions, Commission advice, and Australian experience.
Others	Increased business confidence would enable the Commission to receive more relevant information, supporting stronger enforcement, more competitive markets, and better outcomes for New Zealand consumers.	Non-monetised, medium	High – reflected in submissions, Australian experience, Commission advice, and consistent with broader economic analysis.
Non-monetised benefits		**Medium - high**	

Tranche 2 Cabinet Decisions – Further changes to improve competition settings

95. The Minister of Commerce and Consumer Affairs is seeking Cabinet policy approval for the following reforms as part of the second tranche of Cabinet decisions:

    a. Enhancing the merger regime

    b. Deterring anti-competitive conduct,

    c. Introducing pro-competition rules, and

    d. Clarifying the prohibition against predatory pricing.

Issue 4: Enhancing the merger regime

96. The existing merger regime lacks the necessary clarity, scope and tools to effectively assess and prevent mergers that may harm competition, particularly in concentrated and dynamic markets. While the substantial lessening of competition test is broadly supported, there is mounting concern that it is not being applied robustly enough in practice to prevent anti-competitive consolidation. Further, while New Zealand's regime is perceived by some as fast, lightly resources and rarely overturned, evidence suggests it may be too permissive.

97. Since 2008, the Commission has declined only 11 out of 176 merger clearance applications (an approval rate of over 93%). From 2018 to 2025, only two mergers were declined (97.5% approval rate). These statistics may partly reflect a genuinely low incidence of harmful mergers, but several stakeholders have raised concerns with "false negatives" – mergers that were cleared or not reviewed but have subsequently reduced competition. For example:

    a. The clearance in 2024 of NZ Post's acquisition of certain courier business assets of PBT Group Limited. While the merger was approved on the basis it was unlikely to substantially lessen competition, adverse impacts were reported shortly after the transaction proceeded. Around 200 independent PBT drivers were reported to have lost their courier runs, with few alternative opportunities in a now more concentrated market. Specialist services for small courier companies were withdrawn, requiring them to reorganise logistics and absorb higher costs. NZ Post has also reportedly increased prices to retail customers up to 30%, and advised smaller firms that prices will rise further from mid-2025. These developments suggest a reduction in competition and choice for both consumers and smaller market participants, despite the merger meeting the legal threshold for clearance.

98. There are also multi-jurisdictional mergers that were cleared in New Zealand but subsequently blocked or remedied in overseas jurisdictions. For example, the Staples/ Office Depot merger was blocked by the US Federal Trade Commission (**FTC**) in 2016, while the New Zealand part of the transaction had been cleared in 2015. Similarly, in 2017 Tronox/Cristal was cleared in New Zealand but blocked in the US by the FTC. More recently,

mergers in sectors such as retail fuel (Z/ Chevron 2016) and construction materials (LafargeHolcim/ CRH) were subject to stricter scrutiny overseas than in New Zealand. Given the similarity of the legal test across jurisdictions, the divergence in outcomes may indicate that New Zealand's regime is under-sensitive to certain competition risks – particularly those arising in global or digital markets.

99. There are further examples of transactions involving minoring shareholding or nascent competitors where the Commission had limited ability to act or impose remedies. For example, in 2017, Vero Insurance New Zealand acquired a 19.9% stake in Tower Limited, raising concerns about diminished competition in the insurance market. Although the Commission opened an investigation, it was ultimately unable to intervene. Similarly, Foodstuffs and Progressive Enterprises each bought 10% of The Warehouse around the time that it announced its intention to enter the grocery market. Despite being declined clearance to acquire The Warehouse, they each retained their shareholding.

100. Stakeholders have raised concerns that the Commission may apply the substantial lessening of competition test (**SLC test**) conservatively, relying heavily on speculative evidence of potential entry, buyer power, or countervailing dynamic, despite empirical ex-post reviews showing that such factors often fail to materialise. In one ex-post study, the Commission expected entry in 17 of 40 markets it cleared, but entry occurred in only 12.

101. The current regime also lacks specific powers to aggregate serial or creeping acquisitions that individually fall below thresholds but collectively entrench market power. Roll-up strategies have been observed in New Zealand sectors like veterinary care, health, and funeral services. Without tools to assess the cumulative impact of such strategies, the Commission may be unable to intervene until competition is already harmed.

102. The Commission's inability to accept behavioural undertakings also limits its ability to address competition concerns in cases where structural remedies are not appropriate or feasible. This gap was highlighted in the proposed merger between Sky TV and Vodafone in 2016, which was ultimately declined. The Commission considered that the merged entity could use Sky's premium sports content to foreclose competition in broadband and mobile markets but had no ability to accept a behavioural undertaking that might have addressed these concerns.

103. Finally, the lack of statutory timeframes for complex cases results in unpredictability for businesses and lengthy investigations. Straightforward mergers have remained relatively timely, but mergers raising competition concerns can take significantly longer. Recent examples include the One NZ/ Dense Air decision in 2024 (122 working days), THL/ Apollo in 2022 (194 working days), and Zoetis/ Betrola in 2022 (209 working days). Two complex international mergers – Microsoft/ Blizzard and SIKA/ MBCC - took 284 and 300 working days respectively.

104. There is also no statutory obligation for the Commission to publish written reasons for its merger decisions, which can affect the ability of parties to challenge the Commission's decisions. For example, in the Microsoft-Activision merger, the Commission announced its decision to grant clearance on 28 April 2023, stating that a public version of the written

reasons would be available "in due course". As at the current date, these written reasons have still not been published. Similarly, for the merger between Reward and Southern Hospitality, the Commission granted clearance on 13 April 2023, indicating the written reasons would be published later. These reasons have yet to be made public.

105. In short, while New Zealand's merger regime has some strengths, it does not provide sufficient clarity or legal mechanisms to address the competitive risks posed by dynamic and concentrated markets. Left unchanged, it is likely that more mergers with long-term negative effects on competition and consumers will proceed unchecked.

Stakeholder perspectives

106. There was general support for retaining the current voluntary merger notification regime, although a range of submitters supported the proposal to strengthen the Commission's powers to address unnotified mergers. Several law firms supported the Commission's recent improvements to merger processes, including informal engagement, while others expressed concerns about delays and insufficient transparency in decision-making.

107. Submitters were divided on whether the SLC test is fit-for-purpose. Some supported codifying elements such as creeping acquisitions and entrenchment of market power to better capture problematic mergers, while others cautioned against overreach and stressed the importance of maintaining legal certainty. Most submitters supported allowing the Commission to accept behavioural undertakings as part of merger clearance or authorisation, although several warned of high monitoring costs and weak deterrence compared to structural remedies.

What options are being considered?

Option One – Status quo

108. Retaining the status quo would mean continuing to rely on the existing voluntary clearance regime, the current SLC test, and the Commission's existing statutory powers. While this would avoid imposing additional compliance costs, the Commission would continue to face challenges when assessing the cumulative effect of acquisitions in concentrated markets or intervening in transactions that are not notified but may harm competition. This will result in mergers proceeding that are subsequently found to lessen competition, but that cannot practically be unwound to restore competition.[12] It would also mean that New Zealand's SLC test is no-longer aligned with Australia, increasing legal uncertainty in the medium term.

109. Submissions generally supported retaining a voluntary notification regime and cautioned against a shift to the Australian model. However, there was concern about the Commission's limited powers to intervene in unnotified mergers, and challenges in applying the current test to creeping acquisitions. Some submitters also expressed

[12] See for example, Commerce Commission v Objective Corporation [2022] NZHC 1864 at [10]-[11] and Commerce Commission v First Gas Ltd [2019] NZHC 231 at [46].

frustration with the lack of clarity and timeliness in merger decisions, including delays in written reasons and unclear procedural steps.

110. Submitters noted that while clearance decisions are generally y issued within 40 working days, complex cases can take significantly longer and vary widely in duration. Recent merger reviews have ranged from 122 working days (Dense Air NZ) to over 280 working days (Microsoft/ Blizzard and SIKA/ MBCC), and some clearance decisions from 2023 have still not had their written reasons published. If left unaddressed, this lack of timeliness will continue to contribute to unpredictability for merging parties and complicate commercial planning. Over time, these delays may indirectly impact productivity and long-term economic growth.

Option Two – Enhanced voluntary regime (MBIE preferred option)

111. The second option is to modernise and strengthen the voluntary merger regime through a package of targeted reforms. These proposals respond to submitter concerns about creeping and killer acquisitions, and the application of the SLC test. This option would clarify the SLC test to explicitly allow the Commission to consider mergers which create, strengthen, or entrench a substantial degree of market power (better capturing killer acquisitions). It would also allow the Commission to address creeping acquisitions by providing for a three-year lookback period. The concept of substantial influence would be clarified by introducing a non-exhaustive list of factors for consideration. The definition of "assets" would be expanded to explicitly include any form of property or right with competitive significance, ensuring that acquisitions of key assets such as infrastructure, intellectual property, or land are subject to scrutiny.

112. This option would also empower the Commission to impose a temporary "stay" to require parties to hold businesses separate pending investigation or clearance in relation to potentially anti-competitive non-notified mergers. The Commission would be able to require parties to apply for clearance where a merger raises competition concerns but has not been voluntarily notified. In addition, the Commission would gain the ability to accept behavioural undertakings as part of a clearance or authorisation, subject to appropriate safeguards to ensure they are effective, enforceable and proportionate.

113. Finally, to improve transparency and business certainty, and in response to submitter concerns, the preferred option would impose statutory timeframes for merger reviews. Complex cases would have a target of 100 working days (in addition to the initial 40 working days provided), with extensions permitted only in specific circumstances. The Commission would also be required to publish a summary of its decision within one working day and full reasons within 20 working days.

114. Several elements of this package were adjusted in response to feedback. For example, the Commission expressed concerns that statutory deadlines may reduce procedural flexibility. To address this, the proposed legislative design includes appropriate exceptions and does not limit the Commission's ability to stop the clock or extend deadlines where justified. Additionally, the proposal to require the Commission to publish a summary decision within one day and full reasons within 20 working days responds to feedback from

legal and business submitters about the lack of timely reasoning, as well as feedback from the Commission that it is not feasible to publish full written reasons on the same day as the decision is made.

115. As mentioned above, the Commission has indicated it supports statutory timeframes in principle but has expressed reservations about embedded deadlines in legislation. It is concerned this could reduce procedural flexibility, particularly around the timing of issue statements and the delivery of reasons. However, the Commission has not strongly opposed this proposal, and many of the risks raised could be managed through appropriate legislative exceptions. We also note that most comparable jurisdictions include merger timeframes in legislation, which support greater transparency and certainty for merging parties.

116. This option responds directly to concerns raised by stakeholders during consultation, aligns New Zealand more closely with international best practice (including Australia, the United Kingdom and Singapore) and is expected to enhance business certainty and improve competitive outcomes by closing key gaps in the merger control regime. It also addresses the OECD's 2022 recommendation to improve the Commission's powers in this area.[13]

Option Three – Mandatory notification regime

117. This option would adopt the same targeted reforms proposed under option two (i.e. clarifying the SLC test, addressing creeping acquisitions, defining substantial influence and assets, providing for behavioural undertakings, and imposing statutory timeframes). However, instead of introducing call-in powers and stay/ hold-separate powers for non-notified mergers, this option would go further by introducing a mandatory notification regime for mergers that meet prescribed thresholds. Most submitters opposed the introduction of a mandatory notification regime and expressed concern about overreach and administrative burden.

118. The design of this option would broadly align with Australia's new merger regime, which comes into effect on 1 January 2026. In Australia, mandatory notification will apply to transactions where the parties' combined annual turnover or transaction value exceeds set thresholds. Completion of a notifiable transaction without clearance will be unlawful, and penalties will apply. This model aims to improve the detection of problematic mergers, strengthen merger enforcement, and provide improved certainty for businesses.

119. Introducing a mandatory notification regime in New Zealand would similarly increase the Commission's ability to proactively assess mergers before they take effect, mitigating the risk that anti-competitive mergers are missed. It would provide businesses with clear requirements around when notification is required and reduce ambiguity about the Commission's ability to intervene.

[13] The OECD recommended that New Zealand "Empower the NZ Commerce Commission to order merger parties to apply for its clearance, to halt integration between parties during its investigation". OECD Economic Surveys: New Zealand, January 2022.

120. However, this option would create substantial new compliance obligations for businesses. All mergers above the thresholds would need to be notified, even where the transactions pose little or no competition risk. It would also impose considerable administrative burden for the Commission, requiring the processing and triage of a much larger number of notifications than under the current voluntary regime. The ACCC has been provided with additional funding to support its new regime, and the Commission would also require significant additional resources to support this new regime. Without additional funding, the Commission's capacity to focus on high-risk mergers would be diluted.

121. A mandatory regime would also reduce flexibility by removing the Commission's ability to target resources towards transactions that raise concerns. Under a call-in power model, businesses with low-risk mergers are not burdened with unnecessary processes, whereas mandatory notification imposes a uniform obligation based on transaction size alone. There would also be transitional risks in setting appropriate thresholds for notification: if set too high, anti-competitive mergers could still escape review. If set too low, benign transactions would be captured unnecessarily, reducing economic efficiency and slowing down legitimate business activity.

122. In summary, while this option would address the same underlying competition concerns as option two, it would do so in a significantly less proportionate and less flexible way. It would impose higher costs on businesses and the Commission without delivering corresponding benefits, particularly given New Zealand's small market size.

Issue 4: Enhancing the merger regime

	Option One – Status quo	Option Two – Enhanced voluntary regime	Option Three – Mandatory notification regime
Effectiveness	0 The status quo is moderately effective where notified mergers are clearly anti-competitive, but fails to address creeping acquisitions, killer acquisitions, and non-notified mergers.	+ 1 Directly addresses enforcement gaps and equips the Commission to promote better outcomes for consumers, though in a small economy the overall scale of improvement may be moderate.	+1 Would ensure all significant mergers are reviewed, increasing the likelihood of detecting harmful mergers, but also capturing many benign transactions.
Practicality	0 The status quo is administratively simple and imposes no new burdens on businesses or the Commission.	-1 The reform introduces moderate additional complexity, such as new powers and timelines, but these are targeted, align with international best practice, and avoid undue compliance burden.	-2 Would significantly increase compliance costs and administrative burden.
Certainty	0 Businesses have adapted to the existing system but face ambiguity about how creeping and killer acquisitions will be assessed. There is also no certainty about how long merger reviews will take or when reasons will be provided.	+ 1 The reforms provide more clarity on key concepts and process and establish statutory timelines, which should enhance certainty, although some new powers may initially require adjustment.	+2 Would provide high certainty about when mergers must be notified but removes flexibility for businesses and regulators.
Flexibility	0 The status quo offers limited flexibility, as the Commission lacks the ability to intervene in non-notified mergers or use behavioural undertakings to resolve concerns without blocking a merger.	+2 The reform adds flexible tools such as call-in powers, stay and hold-separate powers, and the ability to accept behavioural undertakings, allowing the Commission to respond to different market circumstances.	-2 Would significantly reduce flexibility by requiring all mergers above the threshold to be reviewed, limiting the ability to target enforcement to high-risk transactions.
Regulatory efficiency	0 The status quo is simple but lacks important tools, resulting in inefficiencies such as reliance on post-merger litigation or market studies.	+1 The reforms improve efficiency by enabling earlier and more effective resolution of competition concerns, reducing the need for reactive enforcement or market studies.	-1 This option would reduce efficiency by requiring significant regulatory resources to review a large number of benign mergers.
Overall assessment	0	+ 4	- 2

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

123. The preferred option (option two) is to amend the Commerce Act to strengthen the voluntary merger regime through targeted legislative changes. This option responds to concerns raised in recent market studies and international reviews and supports the Government's goals of lifting productivity and reducing the cost of living. While an alternative approach of introducing a mandatory notification regime (option three) was also considered, this would impose significantly higher compliance costs without delivering corresponding benefits for New Zealand's small economy.

124. The preferred option better aligns New Zealand's merger settings with international best practice, particularly with recent reforms in Australia, while remaining appropriate for the New Zealand context. The proposed changes will improve certainty around how the Commission assesses complex transactions and ensure the regime remains effective in dynamic and digitally enabled markets. Unlike a mandatory notification regime, the preferred option preserves the flexibility to focus enforcement resources on high-risk transactions and reducing regulatory burden on businesses.

125. The preferred option will primarily affect businesses undertaking mergers and acquisitions in concentrated markets or where acquisitions raise competition concerns. Most businesses engaging in straightforward or pro-competitive mergers are unlikely to experience significant changes, and the core structure of the voluntary clearance regime remains intact. It is likely that some businesses will opt to notify the Commission of their merger given the Commission's increased powers in respect of non-notified mergers.

126. Consumers are expected to benefit from the reform through stronger protection against anti-competitive mergers, supporting lower prices, improved product and service quality, and greater innovation over time. Smaller businesses and new entrants should also benefit indirectly from a more competitive environment and lower barriers to entry.

127. Most submitters supported retaining New Zealand's voluntary merger regime, noting it generally works well in a small-high trust market where the Commission has good visibility over merger activity, including through media and transaction monitoring, complaints, tip-offs and ongoing engagement with legal and industry stakeholders. A mandatory notification regime was considered less suitable given the risks of setting thresholds too high (missing harmful mergers) or too low (capturing benign ones). The preferred option preserves flexibility while introducing targeted powers to improve oversight without imposing blanket obligations.

128. The analysis assumes that the Commission will apply the new powers in a proportionate and targeted manner, and that clear guidance will be developed to support business certainty. While additional compliance costs may arise for a small number of complex or borderline mergers, these are expected to be offset by improved clarity, procedural safeguards, and more timely merger decisions. The introduction of statutory timeframes should reduce uncertainty and delay costs for most parties.

129. Some risks and uncertainties remain, particularly in how the new powers will be applied in practice and whether they could, at least initially, introduce uncertainty for businesses. These risks are expected to diminish over time as precedent and guidance develop. The benefit-cost ratio is expected to improve as the Commission and businesses adjust to the updated regime, and the longer-term benefits to competition and consumers are realised.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Some firms may incur modestly more compliance costs due to the strengthening of the SLC test and the three-year lookback period for creeping acquisitions. However, clearer rules, predictable timelines and more transparent decision-making should reduce costs for many transactions overall.	Non-monetised, low	Medium – noted in submissions but mixed views, some see improved certainty as reducing costs.
Regulators	The exercise of new powers (call-in, hold-separate and behavioural undertakings) and the administration of statutory timeframes will increase the Commission's operational and administrative burden, particularly in complex cases. However, call-in powers may in fact reduce the Commission's workload in some instances. Currently, the Commission must apply to the Court for an injunction to prevent a merger from proceeding, which is time-consuming and resource intensive. A statutory call-in power would allow the Commission to initiate a review directly, improving efficiency. While it is not possible to provide a precise cost estimate, most additional	Non-monetised, medium	Medium - the scale depends on frequency of complex cases.

	workload is expected to be manageable within existing resourcing for standard transactions. Where resource pressures do arise – for example, due to overlapping complex cases – these may need to be managed through internal reprioritisation. The Commission has indicated that, absent new resourcing, implementation may involve opportunity costs for other areas of work. However, cost recovery mechanisms for behavioural undertakings will help offset these impacts, and the independent Effectiveness and Governance review of the Commission is expected to support further resource planning and prioritisation.		
Others	Possible risk that some mergers may be deterred due to stronger scrutiny, with the potential that consumers could miss out on efficiency benefits.	Non-monetised, low	Low – from international experience and OECD commentary.
Non-monetised costs		**Low – medium**	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Improved certainty, predictability, and timeliness of merger assessment due to clarified tests, guidance, and statutory timeframes.	Non-monetised, medium	Medium – consistent with economic literature and experience from similar jurisdictions.
Regulators	More effective enforcement toolkit, including ability to intervene in problematic non-notified mergers and accept behavioural remedies when appropriate.	Non-monetised, medium	Medium – consistent with economic literature and experience from similar jurisdictions.

Others	Reduced risk of anti-competitive mergers, especially in dynamic and concentrated markets. Long-term benefits include stronger competition, lower prices, and improved innovation.	Non-monetised, high	Medium – consistent with economic literature and experience from similar jurisdictions.
Non-monetised benefits		**Medium – high**	

Issue 5: Deterring anti-competitive conduct

130. The Commerce Act prohibits anti-competitive agreements through sections 27 and 30, which apply where there is a "contract, arrangement or understanding" between parties. However, in practice, competitors can coordinate in ways that soften competition without forming an agreement. This includes behaviour such as sending price lists to competitors, making public statements to signal future pricing, or channelling information through intermediaries like trade associations. These forms of coordination may fall short of the legal threshold for an "understanding" and are therefore not currently prohibited.

131. Further, businesses are increasingly using algorithmic tools and AI to monitor competitors, set prices, automate strategic decisions. It is estimated that over 30% of large retailers in sectors like travel, accommodation and e-commerce report using algorithmic pricing tools.[14] These tools enable rapid price matching and market monitoring, reducing the incentive to undercut rivals or innovate.

132. These tools may facilitate outcomes that harm competition, such as by responding rapidly to a competitor's price changes in a way that reduces the incentive to undercut or innovate. For example, the Competition and Markets Authority (**CMA**) in the United Kingdom uncovered a cartel arrangement between two suppliers of sport and entertainment merchandise, GBE and Trod. An initial agreement that GBE would not undercut Trod on Amazon Marketplace proved unworkable, because of difficulty in making daily changes to the large number of listed products. GBE and Trod then agreed to use repricing software to automatically change their prices to limit price competition.[15]

133. In the United Kingdom, the CMA's 2021 guidance on algorithms noted that firms using similar or shared pricing software may converge on stable pricing patters – especially in concentrated markets. In 2023, the CMA launched a dedicated Algorithmic Collusion Taskforce in response to these risks. New Zealand has no equivalent capability or legislative clarification, and stakeholders have raised concern that our current settings lag behind.

134. While conduct facilitated through AI or pricing algorithms may already be within scope of the Commerce Act if it otherwise meets the elements of a prohibited provision,[16] there is legal uncertainty, and existing liability may not be well understood. Without clarification, there is a risk that businesses could assume that anti-competitive conduct undertake on their behalf through AI or algorithms is not captured by the Commerce Act.

Stakeholder perspectives

135. Most submitters, particularly major law firms, opposed introducing a concerted practices prohibition, arguing that the existing Commerce Act provisions already capture most harmful coordination, and that further reform risks overreach and chilling legitimate

[14] Fetcherr, Dynamic Pricing: How Leading Companies Optimize Revenue in 2025.
[15] CMA, Case 50233, 12 August 2016, OECD Economic Surveys: New Zealand 2024 | OECD.
[16] For example, agreeing to price using the same formulae amounted to price fixing in Commerce Commission v GE Milfos International Ltd [2019] NZHC 1426.

conduct. They cautioned that uncertainty around what constitutes a concerted practice could deter beneficial collaboration or standard commercial behaviour such as information sharing. However, several consumer advocates, economists, and smaller market players supported a prohibition to better address harmful coordination in concentrated markets, pointing to examples in the grocery, fuel, and banking sectors. Some submitters raised concerns about the growing use of AI and algorithmic pricing tools, which could further help enable anti-competitive behaviour.

What options are being considered?

Option One – Status quo

136. Under the status quo, the Commission would continue to rely on existing prohibitions in the Commerce Act, which require evidence of an agreement, arrangement or understanding. Enforcement against tacit coordination or conduct facilitated through digital tools will remain challenging. These challenges are likely to intensify as AI-based pricing tools and digital platforms become more embedded in commercial decision-making. In sectors such as retail, travel, and ride-sharing, businesses are increasingly using automated repricing software that can instantly match competitors' prices without direct communication between firms. This may lead to coordinated outcomes that reduce price competition, even in the absence of direct human involvement.

137. In the absence of legislative change, enforcement against coordinated outcomes arising from algorithmic tools will remain limited. Several submitters, including major law firms, argued that existing tools are sufficient and that concerted practices can already be captured where there is a meeting of minds or attempts to reach an understanding. Overseas experience suggests these risks are not hypothetical – in the United Kingdom, repricing software was used by competing sellers on Amazon to avoid undercutting each other, and in the US, the Federal Trade Commission has prosecuted similar conduct automated pricing tools in e-commerce.

138. New Zealand's growing digital economy means local businesses are likely to adopt similar technologies, particularly in sectors like online retail, accommodation, and air travel. For instance, in the ride-sharing industry, Uber's use of dynamic pricing algorithms has come under scrutiny. Following the exit of competitor Ola from the New Zealand market, First Union expressed concerns that Uber's dominant position could lead to price manipulation, harming both consumers and drivers. In the tourism industry, companies like Tourism Holdings Limited have adopted sophisticated revenue management systems that use AI-driven dynamic pricing to adjust rates in real-time based on demand fluctuations. Over time, this is likely to lead to an erosion of price competition and innovation in digital markets, with reduced consumer benefit and growing regulatory uncertainty.

Option Two – Confirm liability for anti-competitive conduct using AI tools (MBIE preferred)

139. This option would amend the Commerce Act to clarify that the existing prohibitions – including sections 27 and 30 – apply equally to conduct using algorithmic or AI-based tools

on behalf of a person. This is the same approach taken to the use of an employee or agent to carry out conduct. The clarification would confirm that businesses remain responsible for the use of such tools, even if the conduct is facilitated without direct human involvement.

140. This is particularly important in sectors where pricing is dynamic and algorithmic tools are commonly used. Ride-sharing, online travel platforms, and supermarket chains are increasingly adopting repricing engines that respond to market signals in real time. The Commission has limited ability to identify or act on coordination where firms claim not to "see" competitors' pricing directly but rely on intermediaries or dynamic pricing systems. Clarifying liability would ensure that enforcement does not depend on whether a person or a machine executed the decision.

141. The Commerce Act already makes firms liable for conduct by an employee or agent acting within the scope of their authority. Applying the same approach to actions by an AI would provide appropriate accountability for the use of AI within a business environment, without extending liability beyond that already intended by the Commerce Act.

Option Three – Introduce a general prohibition on concerted practices

142. This option proposes amending the Commerce Act to explicitly prohibit anti-competitive "concerted practices", thereby aligning New Zealand's competition law with international standards, such as those in Australia, the European Union, and the United Kingdom. Currently, the Commerce Act prohibits anti-competitive conduct only where it arises from a "contract, arrangement, or understanding". This framework does not adequately address coordinated conduct that falls short of a formal agreement but still harms competition.

143. A "concerted practice" refers to coordinated conduct between businesses that does not involve a formal agreement but results in anti-competitive outcomes. For instance, competitors might share pricing information to align their prices in a way that reduces competition without any explicit agreement.

144. Introducing a prohibition on concerted practices would enable the Commission to address a broader spectrum of anti-competitive behaviour and would address enforcement gaps in sectors where formal agreements are unlikely but coordinated behaviour is prevalent. For example, in the retail fuel sector, the Commission's 2019 market study found that fuel companies often set prices with regard to each other's pricing, rather than competing intensely on price. This pattern suggests a stable oligopoly where price matching occurs without explicit agreement, and the Commission observed that retail fuel prices in New Zealand were among the highest in the OECD, with importer margins having more than doubled over the previous decade, indicating weak competition.

145. This proposal attracted mixed feedback. While some submitters supported aligning New Zealand's law with international regimes, including Australia and the EU, others were strongly opposed, arguing that the existing prohibition on cartel conduct already addresses most harmful coordinated behaviour. Submitters opposed to the prohibition expressed concern that it could deter legitimate conduct, such as businesses sharing information for

the benefit of consumers. They argued these practices are pro-competitive or neutral and already subject to oversight under the Commerce Act. However, several submitters also gave examples of conduct (e.g. in banking, grocery, and fuel) that would not currently breach the Commerce Act but could be harmful and should arguably be captured under more explicit rules.

146. Although concerted practices between firms can have serious anti-competitive effects, introducing a prohibition presents several challenges. Defining what constitutes a concerted practices requires careful consideration to avoid capturing legitimate business conduct. There is a risk that the prohibition could blur the line between illegal coordination and lawful, rational responses to market signals – such as following a competitor's publicly available ricing or adapting to shared market trends. This ambiguity could lead to businesses becoming overly cautious and refraining from socially beneficial collaboration. There is also a risk of increased compliance costs, as firms may feel obliged to seek legal advice before engaging in any coordination with peers, even where conduct is low risk. A few submitters recommended caution, noting that international approaches are still evolving.

147. Therefore, while introducing a prohibition on concerted practices would strengthen New Zealand's competition law framework and enhance the Commission's ability to tackle anti-competitive behaviour, it would require careful implementation to balance effective enforcement with the need to avoid stifling legitimate business collaboration.

Issue 5: Deterring anti-competitive conduct

	Option One – Status quo	Option Two – Confirm liability for conduct using AI tools	Option Three - Introduce a general prohibition on concerted practices
Effectiveness	0 The current framework does not address the enforcement gap relating to tacit coordination or provide clarity around AI-enabled conduct.	+1 Supports effective enforcement by confirming that anti-competitive conduct remains unlawful even when carried out through AI.	+2 Addresses a gap in the Commerce Act by broadening the definition of "understanding" to capture more forms of anti-competitive conduct.
Practicality	0 No change required, but limitations in the Commerce Act may constrain the Commission's ability to intervene in modern coordination scenarios.	+1 This is a low-cost and straightforward amendment that does not require new enforcement tools or additional guidance to implement effectively.	-1 Would require significant explanatory guidance, active engagement with stakeholders, and a bedding-in period.
Certainty	0 The current framework is well understood, but uncertainty remains regarding what behaviour contravenes the Commerce Act.	+2 Provides a high degree of legal certainty for businesses by confirming that the use of AI does not exempt firms from existing competition prohibitions.	-1 Would introduce material legal uncertainty for businesses as the boundaries of the new concept of "concerted practices" is developed through case law.
Flexibility	0 The Commerce Act is not well equipped to deal with AI-driven strategies or with coordinated conduct that stops short of an "understanding" as currently defined.	+1 Improves the Commerce Act's resilience to future businesses models by acknowledging that enforcement tools apply regardless of the medium or tool used.	+1 Improves the regime's ability to adapt to new coordination strategies, particularly in concentrated sectors.
Regulatory efficiency	0 The status quo avoids new costs, but enforcement remains limited and reactive.	+2 Enhances regulatory efficiency by supporting early compliance and deterring unlawful conduct without requiring structural change or additional resources for enforcement.	+1 Could increase enforcement efficiency in the long run, but may involve significant upfront transitional costs for businesses and the Commission as the new concept is interpreted and applied.
Overall assessment	0	+ 7	+ 2

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

148. The preferred option is to clarify that existing prohibitions in the Commerce Act apply equally to anti-competitive conduct carried out using AI or automated tools (option two). This low-cost, targeted legislative change would close an emerging enforcement gap by confirming that businesses remain liable for conduct facilitated by AI or automated systems. It would provide greater legal certainty as the use of these tools becomes increasingly common and would support timely and efficient enforcement without requiring structural reform. While narrower in scope than a general concerted practices prohibition, this option is proportionate to the current stage of market development and can be easily implemented.

149. We recognise that concerted practices remain a concern, particularly in concentrated markets such as fuel, banking, and groceries, where firms may align their behaviour in ways that reduce competition without reaching a formal agreement. While option three would equip the Commission to intervene in these situations more directly, it may be more appropriate to leave it open to the Commission to bring a test case under existing provisions to help clarify whether there are genuine enforcement gaps in the law.

What are the marginal costs and benefits of the preferred option?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Some businesses may incur low, one-off costs to confirm that AI-enabled pricing or decision-making complies with existing prohibitions.	Non-monetised, low	High – businesses are already subject to prohibitions on anti-competitive conduct, and the clarification simply reinforces that these prohibitions also apply to AI-enabled conduct.
Regulators	The Commission may need to update external guidance and handle some short-term engagement or enquiries.	Non-monetised, low	High – the clarification requires only minor updates to the Commission's existing guidance and does not require a new enforcement framework.

Others	No fiscal costs to consumers or other government agencies.	Non-monetised, low	Medium – there are no direct fiscal costs anticipated for consumers or other government agencies.
Total monetised costs		**Low**	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Provides clarity for firms using AI, reducing legal uncertainty and the risk of inadvertent non-compliance.	Non-monetised, medium	Medium – Clarification provides meaningful legal certainty for businesses using AI.
Regulators	Strengthens the Commission's ability to enforce the law and reduces ambiguity when assessing AI-enabled conduct.	Non-monetised, medium	Medium – Clarification reduces ambiguity and will make it easier for the Commission to enforce against anti-competitive conduct.
Others	Clarification may deter anti-competitive use of AI, contributing to more competitive outcomes and a level playing field.	Non-monetised, low	Medium – Effects depend on market structure and technology uptake.
Total monetised benefits		**Medium**	

Issue 6: Pro-competition rules

150. Certain sectors of the economy are characterised by identifiable and persistent competition problems, that existing competition law may not effectively address. In the absence of effective regulatory tools, primary legislation has offered the only remedy which has proven to be a slow and resource-intensive approach. Examples include the Grocery Industry Competition Act 2023 and the Fuel Industry Act 2020, each of which was developed in response to the findings of a Commission market study.

151. New Zealand's economy features several sectors with high levels of market concentration, often dominated by a small number of firms. While precise quantification of oligopolistic markets is difficult due to data limitations and complex market definitions, available evidence suggests that concentrated market structures are a feature of many key industries. For instance, the banking sector is controlled by four major Australian-owned banks that together hold over 90% of mortgage and retail banking services.[17] The supermarket sector is a classic duopoly, with Foodstuffs and Woolworths controlling around 90% of the grocery market.[18] In electricity generation, five firms produce or control over 85% of output.[19] Telecommunications are similarly concentrated among Spark, One NZ, and 2degrees.[20]

152. A 2016 MBIE study assessing over 300 industries using a 'profit elasticity' measure found signs of weak competition particularly in banking, agriculture, forestry, fishing, finance and insurance, and wholesale trade.[21] 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.[22] 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.

153. Australia has faced similar challenges with concentrated markets and weak competition, particularly in sectors like franchising, agriculture, and energy. In response, it introduced a flexible regulatory tool under the CCA that allows for the creation of enforceable industry codes of conduct. These codes are designed to address harmful conduct and power imbalances without requiring primary legislation, offering a more agile and targeted policy response. The Australian model provides a useful precedent for how New Zealand might strengthen its own competition framework through delegated rule-making powers.

Industry codes in Australia

154. Industry codes in Australia are governed by the CCA. These codes are regulatory instruments that establish legally enforceable standards of conduct for businesses. They

[17] Commerce Commission, Abridged-version-Final-report-Personal-banking-services-market-study-20-August-2024.pdf.
[18] Commerce Commission, Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf.
[19] Electricity Authority, Level Playing Field measures - options paper.
[20] Commerce Commission, 2023-Telecommunications-Monitoring-Report-15-August-2024.pdf.
[21] MBIE, Competition in New Zealand Industries.
[22] OECD, OECD Economic Surveys: New Zealand 2024 (EN).

are designed to address market failures, promote fair trading, and protect consumers and smaller market participants from unfair practices.

155. The Governor-General may prescribe an industry code by regulation under section 51AE of the CCA. These codes can apply to all persons, a specified class of persons, or persons engaged in a particular industry. The legislation provides broad discretion in the design of codes, allowing them to regulate a range of commercial behaviours, including contract terms, dispute resolution processes, information disclosure, and supply chain conduct. Codes may also confer powers and functions on third parties, such as industry ombudsmen or regulators, and may incorporate external documents such as technical standards.

156. The scope of industry codes is intentionally broad. A code may regulate the conduct of one or more persons in the carrying on of one or more businesses (section 51ACA). This allows codes to be tailored to the specific dynamics of different sectors, including franchising, agriculture, energy, and retail. There are no fixed thresholds for when a code must be introduced; rather, the decision is based on policy considerations, including evidence of systemic market failure, power imbalances, or consumer harm.

157. The introduction of a new code requires a Regulation Impact Statement (RIS), public consultation, and Cabinet approval. Once prescribed, a code becomes legally binding, and non-compliance may result in enforcement action by the ACCC, including infringement notices, court proceedings, and civil penalties (section 51ACAA). There are no specific statutory appeal rights under Part IVB, but enforcement decisions may be subject to judicial review.

158. Australia has implemented several mandatory industry codes under the CCA, including the Franchising Code of Conduct, Horticulture Code, Dairy Code, Food and Grocery Code, Oil Code, and Electricity Retail Code 1. These codes have been used to address a range of issues, such as power imbalances between franchisors and franchisees, unfair contract terms in agricultural supply chains, and pricing transparency in energy markets.

Stakeholder perspectives

159. Submitters were roughly split on the value of a new rule-making power. Some supported the idea as a flexible, targeted intervention tool, particularly in concentrated markets where other tools have proven insufficient. Others, including legal and business stakeholders, cautioned against duplicative or overly bespoke regulation that could distort competition and favour large incumbents. Several submissions stressed the need for careful design and strong consultation requirements to mitigate these risks.

Option One – Status quo

160. Under the status quo, government intervention in markets relies primarily on market studies and, where required, the introduction of primary legislation. This model avoids creating additional regulatory instruments or compliance costs for businesses unless systemic issues are identified. However, it is slow, resource-intensive, and often fails to respond in a timely or targeted way to entrenched competition problems.

161. In markets with persistent structural barriers – such as high concentration, vertical integration, access issues, or exclusive dealing arrangements – there may be no clear contravention of the Commerce Act. In these cases, general enforcement interventions are not available, and the only way to address competition issues is through the creation of bespoke legislation, such as the Grocery Industry Competition Act or Fuel Industry Act. These processes are time-consuming and politically resource-intensive, and in the meantime, consumers face higher prices, lower quality, and fewer choices.

162. The lack of a flexible enforcement mechanism has economic consequences. Firms in concentrated markets face weak incentives to innovate or lower prices, while barriers to entry remain. Low levels of intervention also increase the risk of suboptimal market structures becoming entrenched, locking in inefficiencies that are difficult and costly to unwind later. Without timely intervention, competition problems often persist for years.

163. Stakeholder feedback on the status quo was mixed. Some supported the current approach for its simplicity and protection against overreach, but many considered it too slow and inflexible to deal with emerging or cross-sector problems – particularly in digital markets or where conduct does not clearly breach existing prohibitions but nevertheless harms competition.

Option Two – Cabinet-approved pro-competition rules (MBIE preferred)

164. This option would establish a new conduct-based rule-making power in the Commerce Act to enable the development of targeted pro-competition rules, made by the Governor-General through Order in Council on the recommendation of the Minister of Commerce and Consumer Affairs. These rules would be used where the conduct of large firms with market power could be changed to address competition issues including through decreasing barriers to entry for new firms or increasing transparency of products to consumers to enable them to better compare products. The power could be used, for example:

    a. to mandate interoperability or data portability in digital markets dominated by a few platforms,

    b. require access to key infrastructure in bottleneck markets, or

    c. impose transparency rules in advertising.

165. Notwithstanding the examples above, the proposed pro-competition rule-making power is not limited to any particular market, sector, or type of conduct. Similar to the industry code-making power in Australia, the proposed rule-making power is intentionally designed as a cross-economy tool that can be applied wherever structural or behavioural features of a market are impeding competition in ways that cannot be adequately addressed through existing enforcement provisions.

166. It would be suitable for sectors with persistent structural barriers, limited competitive pressure, or entrenched incumbents with strategic advantages. While market concentration is relatively widespread in New Zealand, the rule-making power is not

intended as a general-purpose regulatory tool. Instead, it would be available in specific cases where robust evidence (following a Commission market study, inquiry or investigation) shows that market features are creating material barriers to competition or entrenched market power and that existing tools under the Commerce Act cannot effectively address the problem.

167. The rule making power would be focussed on conduct-based remedies to increase competition. The rule could not be used to change market structures for examples through forced divestment nor could it be used as a form of price regulation akin to the regulation of essential monopoly sectors under Part 4 of the Commerce Act. The Minister's use of the rule making power would be further constrained as it could only be used following a recommendation from the Commission, that it is satisfied a rule is necessary or desirable to address material barriers to competition or entrenched market power. This provides the flexibility to respond to a range of market features—whether they arise in digital platforms, infrastructure access, wholesale arrangements, or traditional supply chains—while ensuring use of the power is grounded in evidence and subject to clear Ministerial oversight.

168. The Commission will operationalise the rule-making power by first encouraging the sector to voluntarily negotiate an agreement to change their conduct to address the particular competition issue. The Commission would then step-in to develop a rule where the sector failed to agree and the competition issue persisted.

169. Enforcement will involve standard enforcement tools in the Commerce Act, such as civil penalties, injunctions, and compensation for affected parties, supported by a graduated penalty framework modelled on the framework in the Grocery Industry Competition Act 2023 for breaches.

170. The Commission has indicated its strong support for Cabinet-approved pro-competition rules and considers it will be an invaluable tool to address identified competition issues. Specific potential use cases are set out below.

Practical use cases for pro-competition rules

171. Pro-competition rules could be used to provide access to certain services to promote competition in downstream markets. For example, MetService and NIWA both own and operate asset networks that provide them with various weather-related data. In 2021, the Commission investigated both organisations for possible breaches of sections 27 and 36 of the Commerce Act 1986, for restricting access to real-time observation data. That investigation was closed without concluding whether breaches had occurred but noted that enforcement was not the best way to solve the issue.

172. Given New Zealand's size, and the lack of private investment, it does not appear efficient to establish additional weather monitoring networks. A pro-competition rule could provide an effective mechanism for ensuring competitors can access weather observation data from existing networks on reasonable price and non-price terms, in place of a competitive

constraint (which exists in other, larger markets). Any requirement would be tightly scoped to only the areas necessary to promote competition in downstream markets.

173. The code could also be used for example in the banking sector to break down barriers to entry to fintechs and neo banks entering and establishing themselves in the market. Fintechs have complained that the banks are preventing them from offering account-to-account payment services by charging high prices to use confirmation of payee services. A pro competition rule making power could be used to encourage the banks to offer fintechs and neobanks access to confirmation of payee services on more favourable access terms (i.e. nearer to the cost of providing the service). In the event the banks could not agree and access terms for fintechs to confirmation of payee services persisted, the Commission could step in the negotiate access terms for entrants and ultimately, set pro competition rules, if needed.

Precedent for Cabinet-approved rules under existing legislation

174. The Telecommunications Act 2001 provides for the development of voluntary and mandatory industry codes to address market failures. Under that Act, the Commission can initiate an inquiry into whether access to certain telecommunications services (such as wholesale broadband or mobile services) should be regulated. The Commission can then recommend regulation to the Minister, who decides whether to accept the recommendation. If accepted, it proceeds via Order in Council. In addition, the Commission can develop industry codes (e.g. around service quality or switching processes), which can be made mandatory by the Minister following public consultation. The framework is flexible, allowing the Commission to designate or specify any telecommunications service for regulation, and to develop codes that apply to any retail service provider and relate to any aspect of retail service quality.

175. The Credit Contracts and Consumer Finance Act 2003 (**CCCFA**) empowers the Governor-General, on the recommendation of the Minister, to make regulations prescribing matters such as advertising standards, disclosure requirements, publication of borrowing costs, and even standardised terms for credit contracts. These powers allow Cabinet to introduce new conduct requirements and standards that apply across the consumer credit market. The Commerce Act authorises regulations on a wide range of matters, including information disclosure, standard terms for credit contracts, and the designation of any arrangements as consumer credit contracts. For example, these powers were used to bring Buy Now Pay Later products within the Commerce Act's framework through the Credit Contracts and Consumer Finance (Buy Now Pay Later) Amendment Regulations 2024.

176. A similar Cabinet rule-making model exists under section 36 of the Fair Trading Act 1986, which empowers the Governor-General to make regulations prescribing consumer information standards. These standards require businesses to disclose information about goods and services and prescribe the way the information must be presented. The power can be used to mandate the disclosure of any type of information for any good or service. They have been used to address a wide range of consumer protection issues across the

economy, including to mandate unit pricing in supermarkets and labelling of water efficiency and energy ratings on appliances. These rules are binding, enforceable, and used to address specific market problems such as information asymmetry.

177. While these examples provide precedent for the use of delegated legislative powers to address a range of consumer and competition issues, they are not directly analogous to the pro-competition rules proposed in this option. Rather, they are included to illustrate how similar mechanisms have been used in New Zealand law. For a closer precedent in terms of purpose and design, the Australian industry code regime offers a more relevant comparison.

Conditions and constraints

178. The rule-making power would be tightly constrained in legislation. A rule could only be conduct-based i.e not used to change the structure of a market or regulate prices akin to regulation under Part 4 of the Commerce Act. A rule could only be proposed where the Minister is satisfied that it is necessary or desirable to address a significant competition issue – such as material barriers to entry or entrenched market power – that cannot be remedied through enforcement alone. Each rule would require:

    a. An inquiry, market study, or enforcement action giving the Commission sufficient information about a competition concern to make a recommendation to the Minister that a pro-competition rule is justifiable,

    b. The sector first having an opportunity to voluntarily negotiate pro-competition rules that can overcome the competition issues identified,

    c. A recommendation from the Commission to the Minister to introduce a new pro-competition rule,

    d. The Minister being satisfied that the rule is necessary or desirable to address material barriers to competition or entrenched market power,

    e. Public consultation with affected parties,

    f. A full regulatory impact statement (RIS),

    g. Cabinet approval, and

    h. A five-year sunset clause, with a requirement for review or expiry.

179. These legislative safeguards would ensure that rules are used only where justified, maintain alignment with broader government priorities, and reflect the public interest.

180. The Commission's decision to recommend pro-competition rules would not be subject to appeal on its substance, but could be challenged through judicial review. This means that affected parties could contest the legality or procedural fairness of the decision-making process, but not the merits of the rule itself. This approach is consistent with other regulatory instruments made by Order in Council, including under the Commerce Act.

181. A supporting new inquiry function would help identify suitable opportunities for intervention, although it would not be a precondition. The regime would remain flexible,

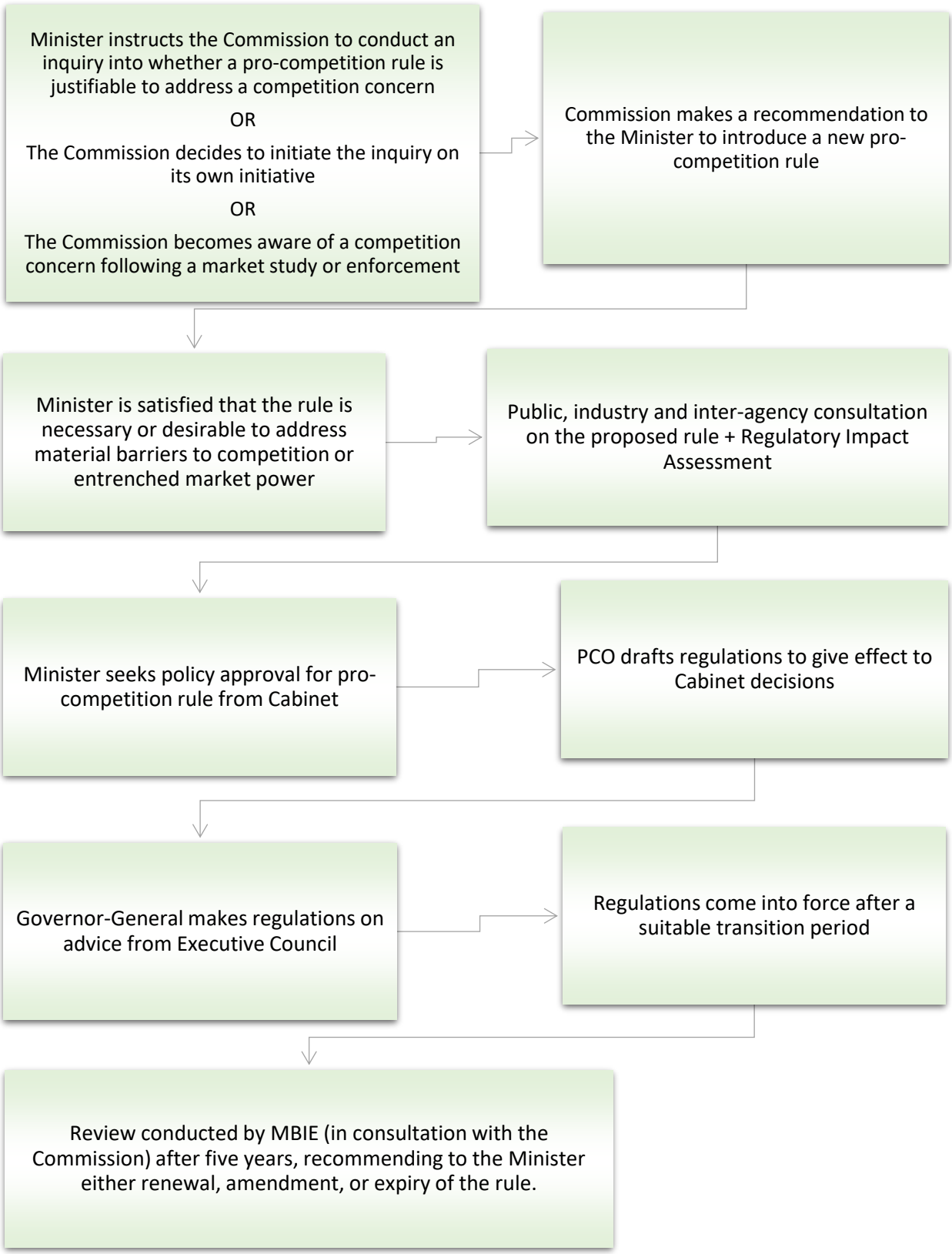
allowing rules to also be developed in response to Commission investigations or systemic issues revealed through enforcement activity.

182. Please see **diagram 1** on the following page for further information about the proposed rule-making process.

183. The costs for developing, enforcing and maintaining pro-competition rules are expected to be met from within the Commission's existing baseline funding, including the allocation set aside to support its market study function. This reflects the intent behind pro-competition rules - they are designed to complement or offer an alternative to market studies, and in some cases may be recommended following a market study. It is therefore appropriate that the Commission draws on its market study resourcing to support this work.

184. Relying on existing funding will require the Commission to carefully balance its priorities. Without a dedicated funding mechanism, there is a risk that resources may be stretched, potentially limiting the Commission's ability to respond flexibly across its full range of functions. An alternative approach would involve amending the Commerce Act to include a levy-making power, enabling the Commission to recover the reasonable costs of its new functions from industry. While a levy-making power could provide a more sustainable funding pathway, the current approach reflects a pragmatic use of existing tools and resourcing.

Diagram 1: Cabinet-approved pro-competition rules



Option Three – Commission-issued pro-competition rules

185. This option would amend the Commerce Act to give the Commission a statutory power to develop and maintain pro-competition rules directly, without requiring Cabinet approval or an Order in Council for each rule. This would allow the Commission to respond more quickly and flexibly to emerging or persistent competition problems.

186. The model would be similar to the Electricity Authority's powers under the Electricity Industry Act 2010, where the Authority develops and amends the Electricity Industry Participation Code (binding rules that apply to industry conduct). This enables responsive and technically informed rule-making without Ministerial sign-off for each rule change.

187. Allowing the Commission to act independently would enable faster interventions, particularly where competition issues arise in fast-moving markets or require tailored solutions. The Commission could leverage its enforcement experience and sector knowledge to design rules that are practical and proportionate.

188. Some stakeholders supported this model for its responsiveness and administrative efficiency. However, concerns were raised about the risk of inconsistent rule-making, over-regulation, inadequate consultation, and reduced accountability to Minister or Parliament. There were also concerns that the Commission could unintentionally diverge from wider regulatory policy, resulting in duplication or fragmentation.

Conditions and constraints

189. This model would require highly prescriptive enabling legislation. The Commerce Act would need to clearly define the scope of the Commission's powers, including:

    a. the specific sectors or industries the Commission can regulate,

    b. what triggers the rule-making power (e.g. market study findings or systemic conduct),

    c. the specific types of conduct that can be mandated or prohibited (e.g. lack of access to essential infrastructure),

    d. what procedural steps must be followed by the Commission to make the rule.

190. Mandatory requirements would need to include:

    a. Public consultation and engagement with affected parties,

    b. Clear publication and notification processes,

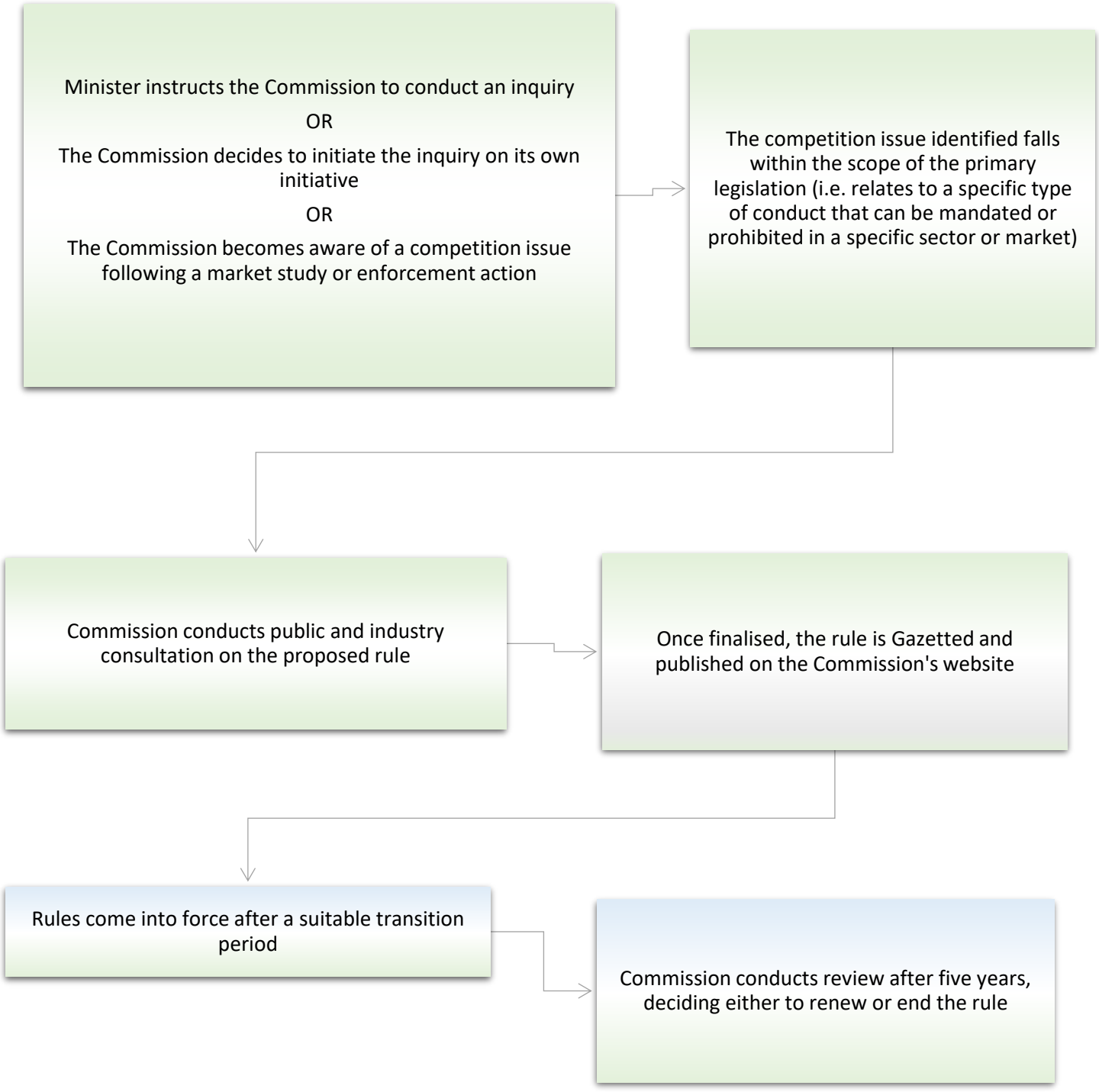
    c. Transparency around how rules align with the purpose and principles of the Commerce Act.

191. The Commission's decision to make pro-competition rules would also not be subject to appeal on its substance, but could be challenged through judicial review.

192. Unlike sector-specific frameworks like the Electricity Industry Participation Code, pro-competition rules under the Commerce Act would need to apply across a range of sectors and markets. This makes it more challenging to define an appropriate legislative scope that is neither too broad nor too narrow. A tightly scoped and well-designed legislative framework would be essential to avoid overlap, conflict with other regulators, or erosion of trust in the Commission's independence.

193. Another relevant precedent for Commission-led rule-making is the Retail Payment System Act 2022, which empowers the Commission to issue binding standards to regulate fees and terms in the payments industry. Under that Act, the Commission may issue standards after the Minister designates a part of the retail payment system as regulated, and only for specific purposes – such as promoting competition or efficiency. The standards must meet a statutory purpose test and are accompanied by consultation and publication requirements. Despite these constraints, implementation has been challenging. Some stakeholders have raised concerns about the clarity and predictability of the regime, the degree of discretion given to the Commission, and how the standards interact with wider financial regulation. This experience suggests that even when Commission rule-making is tightly constrained, risks around coordination, accountability, and perceived overreach remain.

Diagram 2: Commission-issued pro-competition rules



Issue 6: Pro-competition rules

	Option One – Status quo	Option Two – Cabinet-approved pro-competition rules	Option Three – Commission-issued pro-competition rules
Effectiveness	0 The status quo is not effective in dealing with competition issues that are unlikely to be subject to a market study or to warrant primary legislative reform.	+2 Enables the government to address specific competition problems quickly and with appropriate oversight.	+2 Enables the government to address specific competition problems quickly.
Practicality	0 Legislative reform through market studies and primary legislation is resource-intensive and slow.	+1 Order in Council process is well understood and can be efficiently implemented.	-1 Legislative design would be complex and harder to ensure clarity on Commission's powers.
Certainty	0 There is a regulatory gap, creating uncertainty for businesses about how competition issues can be addressed.	-1 Risk of uncertainty for businesses if rules could change frequently without parliamentary oversight however rules can only change following a recommendation from the Commission and Cabinet approval (supported by a regulatory impact assessment).	-2 Significant risk of uncertainty for businesses if rules could change frequently and quickly without additional parliamentary or Cabinet oversight and absent the Cabinet regulatory impact assessment process.
Flexibility	0 The status quo does not allow flexibility to issue rules to address emerging competition issues.	+1 Rules can be updated periodically and adapted to market changes but must go through formal approval process.	+1 Commission could adapt rules more easily over time, but flexibility is limited by the need for detailed upfront legislative scoping
Regulatory efficiency	0 Legislative reform is inefficient, costly, and slow.	+ 1 Avoids the need for new primarily legislation each time but retains oversight via Cabinet and RIS requirements.	+ 1 Administratively efficient to make rules
Overall assessment	0	+ 4	+ 1

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

194. Option two (Cabinet approved rules as secondary legislation) is likely to best address the identified policy problem, meet the policy objectives, and deliver the highest net benefits. It would provide a more efficient, timely, and cost-effective mechanism for addressing competition concerns in markets that are unlikely to be the subject of a market study or warrant primary legislative reform. By enabling targeted interventions through enforceable rules, option two would allow for faster responses to entrenched competition problems, particularly in markets with persistent structural issues. Option two provides the additional safeguard that rules cannot be politicised as they first require a recommendation from the Commission that the rules are required to address a competition issue, following a Commission inquiry.

195. While option three (Commission drafted rules as tertiary legislation) would provide a faster route to intervene, it raises more significant legislative design and accountability risks. Option two uses a model with precedent in Commission-enforced law – namely the CCCFA and FTA – where Cabinet-approved rules have been effectively used to introduce conduct standards, consumer protections, and information disclosure requirements in response to market failures.

196. Although both options require enabling legislation, there is an important difference between legislation that sets out defined circumstances for Cabinet to act – as in option two – and legislation that delegates tertiary rule-making powers to an independent regulator – as in option three. The former provides for clearer democratic oversight and more flexible decision-making, while the latter either risks overreach (especially when applied economy-wide), or a narrowly constrained regime that is unable to respond to evolving market conditions.

197. Option two would improve the functioning of markets by enabling more dynamic, responsive regulation where existing tools are insufficient. It would be particularly effective in addressing issues such as barriers to entry, lack of transparency, and imbalance in bargaining power, which are often difficult to remedy through existing tools in the Commerce Act. By ensuring rules can only be made following a Commission recommendation, maintaining Ministerial and Cabinet oversight, provides additional scrutiny, including through the regulatory impact assessment process, that rules are required to address a particular competition issue. Option three, by comparison, lacks these institutional checks and would be more difficult to calibrate effectively across diverse sectors and evolving market conditions.

198. A comparable example of independent rule-making by the Commission is under the Retail Payment System Act. While this regime is more limited in scope, stakeholders have raised concerns around clarity and regulatory discretion. That experience reinforces the case for Cabinet oversight of rule-making, particularly where rules may have cross-sector implications or affect the broader economic framework.

199. While option two may impose additional compliance costs on businesses, particularly those required to adjust their practices to comply with the new rules, these costs are expected to be limited if rules are well-designed, clear, and unambiguous. It is true that

lowering the barriers to regulation could increase the likelihood of regulatory intervention. However, the proposed framework includes safeguards to avoid overreach – including a high statutory threshold, mandatory consultation, and Cabinet approval. Importantly, the appropriate counterfactual is not a world without regulation, but one in which intervention occurs later – and less flexibly – via primary legislation. In many cases, option two would provide a lower-cost and quicker pathway to achieve the same regulatory outcomes. In these scenarios, the primary benefit is bringing forward the gains from improved competition, with few downsides. In other cases, the availability of option two may enable intervention where the cost or delay of full legislative reform would have otherwise made action unviable.

200. While the development and oversight of pro-competition rules would impose additional resource demands on MBIE, Parliament and the Commission, these are expected to be moderate relative to the benefits of avoiding the time and resource costs associated with primary legislative reform. Option three would ease some of these resource demands by shifting rule drafting fully to the Commission, but at the expense of transparency, good legislative design, and government accountability. Overall, option two provides a balanced and credible approach: it is fast enough to respond to real harms, structured enough to maintain public legitimacy, and flexible enough to be used when needed.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Some firms will face compliance costs to adjust practices to align with new rules. In many cases, these costs are comparable to what would occur under delayed legislative intervention but incurred earlier. Although firms benefiting from weak competition may be adversely affected, more effective competition would benefit other firms and new entrants.	Non-monetised, medium	Medium – compliance costs noted in submissions, magnitude depends on clarity, scope, and how much earlier rules take effect than under legislative reform.
Regulators	There will be resource implications for the Commission in monitoring and	Non-monetised, medium	Medium – experience with other regulatory regimes suggest

	enforcing new rules. However, resource use is likely to be lower and more targeted than what would be required for enforcing new primary legislation. These costs are currently expected to be met from within baseline funding, including the market studies allocation.		workload is meaningful but manageable.
Others	There is a theoretical risk that poorly coordinated rules could lead to regulatory overlap, which could result in unintended impacts on consumers. However, these risks are expected to be minimal with appropriate consultation and Cabinet oversight.	Non-monetised, low	Medium – submissions did not identify costs to consumers as a significant concern, and similar rule-making powers in other jurisdictions (e.g. United Kingdom, Australia) have not led to evidence of harm to consumers.
Non-monetised costs		**Medium**	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	More effective competition and fairer rules will especially benefit smaller firms and new entrants.	Non-monetised, medium	Medium – supported by stakeholder submissions and consistent with economic theory.
Regulators	The ability to issue rules would strengthen the competition toolkit, allowing gaps to be addressed where conduct does not breach the Commerce Act but harms competition.	Non-monetised, medium	Medium – based on submissions and international experience demonstrating that more flexible regulatory tools improve competition outcomes.
Total monetised benefits		**Medium**	

Issue 7: Predatory pricing

1. Predatory pricing is a form of anti-competitive conduct where a firm with substantial market power deliberately sets prices below cost, over a sustained period of time, to eliminate competitors or deter market entry. While consumers may benefit from lower prices in the short term, the longer-term impacts can include higher prices, reduced innovation, and diminished productivity. The predatory pricing prohibition is intended to promote competition over the long term; it is not intended to protect competitors, including new entrants, from the rigour of competition.
2. In New Zealand, allegations of predatory pricing have arisen across at least two of MBIE's recent consultations, including in the airline and grocery sectors. The issue has also arisen in the building supplies sector. In the grocery sector, the Commission's 2022 market study noted concerns about pricing behaviour that major grocery retailers, including the use of promotions or pricing strategies that could disadvantage smaller rivals or new entrants.[23] While the study did not fully assess whether predatory pricing had occurred, it highlighted the risk of exclusionary conduct in a highly concentrated market.
3. Despite these concerns, enforcement has been limited, and the Commission has only taken two cases: *Port Nelson* (1994) and *Carter Holt Harvey* (2006). These cases did not establish a clear economic framework for assessing below-cost pricing, and neither adopted an objective price-cost test that could guide future enforcement.
4. Under current law, the Commission must prove that a firm:
    a. Holds substantial market power;
    b. Has engaged in sustained below-cost pricing;
    c. Has harmed or is likely to harm competition, or acted with exclusionary intent.
5. However, New Zealand does not currently define what constitutes "below-cost" pricing in economic terms. The lack of an objective test creates uncertainty for both regulators and businesses. It makes it difficult for new entrants to demonstrate harm and allows dominant firms to argue their pricing is lawful. There is also ambiguity around whether the Commission must prove that the firm can recoup its losses after excluding competitors.
6. Previous case law confirms that the Commission does not need to establish a predator's intent to recoup losses following a competitor's exit from the market in order to prove a substantial lessening of competition. In the *Port Nelson* decision, the court noted that while evidence of actual or potential recoupment may support such a finding, it is not a prerequisite. However, the Commission notes that parties under investigation may still argue that the absence of recoupment intent weakens the Commission's case.
7. This uncertainty has been compounded by the 2022 amendments to the Commerce Act, which replaced the previous "purpose-based" test with an "effects-based" test. The Commission no longer needs to establish that a firm took advantage of its market power for an anti-competitive purpose; instead, it must show that the conduct has the purpose, effect, or likely effect of substantially lessening competition. While this change aligns with international best practice, it raises new questions about how predatory pricing should be

[23] Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf.

assessed – particularly what level or duration of below-cost pricing meets the threshold for harm and the status of previous caselaw.

8. In summary, the current legal framework lacks clarity and enforceability. The absence of an objective test, limited case law, and uncertainty following the shift to an effect-based standard all contribute to a regulatory gap that may allow anti-competitive pricing to persist unchecked.

Stakeholder perspectives

9. Some stakeholders have raised concerns that suggest potential predatory pricing behaviour, though explicit allegations remain limited. Monopoly Watch's submission refers to "pocket pricing" as a tactic used by dominant firms to target competitors in specific locations, while the Grocery Action Group cites media commentary on "dominant firms' pricing restrictions" as part of broader concerns about exclusionary conduct. While these references are not formal allegations, they reflect a perception among some stakeholders that pricing strategies by powerful firms may be used to suppress competition. This aligns with feedback received during targeted consultation, where concerns were raised about barriers to entry and aggressive pricing in concentrated markets; however, no consultation has been undertaken specifically on predatory pricing.

Option one – Status quo

10. Under the current framework, predatory pricing is addressed through section 36 of the Commerce Act, which prohibits conduct by firms with substantial market power that has the purpose, effect, or likely effect of substantially lessening competition. While this provides a basis for enforcement, the absence of an objective test for the economic element of below-cost pricing and limited case law means enforcement is likely to remain infrequent. The evidentiary burden on the Commission and complainants remains high, and uncertainty around what constitutes unlawful pricing will persist. However, over time, a suitable case could be brought before the courts, which could help clarify the legal thresholds and reduce uncertainty.

11. The recent shift to an effects-based test under section 36 reinforces existing case law -such as *Port Nelson* - which confirms that the Commission is not required to prove a defendant's intent to recoup losses in order to establish a substantial lessening of competition. While evidence of actual or potential recoupment may support such a finding, it is not a legal prerequisite. However, given the legislative change since *Port Nelson*, there is a risk that defendants may seek to relitigate the relevance of recoupment - arguing that without it, the alleged predatory pricing lacks long-term anti-competitive effect. Clarifying the Commission's position on this point will help ensure the law remains focused on the effects predatory pricing has had on competition.

12. Therefore, in concentrated markets such as aviation and groceries, where dominant firms are well established, the status quo may continue to present challenges for new entrants. Concerns have been raised about pricing behaviour that could deter entry or expansion, but without clearer legal thresholds, such conduct will remain difficult to challenge. At the same time, retaining the current approach preserves flexibility. It also leaves open the possibility

that judicial clarification - through a Commission-led or private enforcement case - could eventually resolve uncertainties.

13. Overall, maintaining the status quo would continue to rely on case-by-case assessment and judicial interpretation. While this may be appropriate in some contexts, it also means that potentially exclusionary pricing strategies are not tested or addressed unless they meet a high threshold for enforcement. This approach is increasingly out of step with international best practice, which favours clearer economic tests to improve enforcement and market contestability.

Option two – Introducing an objective economic test for predatory pricing and clarifying the Commission does not need to establish intention to recoup losses

14. This option proposes amending the Commerce Act to introduce an objective economic test for predatory pricing. The aim is to provide clearer guidance on what constitutes below-cost pricing and when such conduct is likely to substantially lessen competition. The proposed test would align New Zealand's approach with major trading partners including the UK, EU, Canada, and Singapore.

15. International practice confirms that cross-subsidisation - where losses in one product or market are offset by profits in another – can be considered within the scope of predatory pricing analysis. The OECD notes that pricing strategies are assessed in context, including across multiple products or services, to determine whether they are exclusionary.[24]

16. Under the proposed framework, pricing below Average Variable Cost (AVC)[25] or Average Avoidable Cost (AAC)[26] would be presumptively unlawful. Pricing above AVC/AAC but below Long-Run Average Incremental Cost (LRAIC)[27] or Average Total Cost (ATC)[28] would only be presumptively unlawful where there is evidence of exclusionary intent or other aggravating factors. These benchmarks are widely used internationally to distinguish between legitimate competition and exclusionary conduct. AVC and AAC help detect avoidable losses, while LRAIC and ATC assess whether pricing excludes equally efficient competitors. This would give businesses clearer benchmarks for assessing pricing strategies and reduce uncertainty about what conduct may breach the Commerce Act. While some businesses may not routinely calculate these cost measures, the OECD notes that AVC and ATC are commonly used because they are relatively easier to apply than more complex alternatives.[29] Regulators in Europe and North America have successfully reconstructed cost data using standard accounting records, and firms with substantial market power are generally well-resourced to undertake such assessments.

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[24] OECD, https://one.oecd.org/document/DAF/COMP(2005)14/en/pdf.
[25] AVC is the average cost of variable inputs (e.g. labour, materials) used to produce each unit of output. Pricing below AVC suggests a firm is not covering its basic operating costs.
[26] AAC is the average cost a firm could avoid by not producing the goods or services in question. This includes both variable costs and any fixed costs that could be saved. Pricing below AAC indicates the firm is incurring losses it could otherwise avoid.
[27] LRAIC is the average cost of producing an additional unit of output over the long term, including both fixed and variable costs.
[28] ATC is the total cost (fixed plus variable) divided by the number of units produced.
[29] OECD, https://one.oecd.org/document/DAF/COMP(2005)14/en/pdf.

17. For enforcement, the introduction of an objective test would lower the evidentiary burden on the Commission by providing a clearer basis for assessing whether pricing is anti-competitive. It would also support earlier intervention, particularly in concentrated markets where exclusionary pricing may deter entry. The proposed changes would also make explicit that proof of recoupment[30] is not required, which codifies caselaw and is consistent with practices in the EU Canada, and Singapore. This recognises that while recoupment can be a helpful factor in showing predatory intent, the focus is on whether the pricing practice itself is likely to harm competition, regardless of whether recoupment is certain.

18. To ensure legitimate competitive behaviour is not captured, the proposal includes a safe harbour for short-term promotional pricing, such as one-off specials, minor discounts, or mistaken pricing.[31] This would help businesses maintain flexibility in pricing while ensuring that sustained patterns of exclusionary pricing can be more effectively addressed. The use of presumptive thresholds rather than absolute prohibitions ensures proportionality and preserves incentives for competition on price. The OECD supports this approach, noting that presumptive tests and safe harbours help balance enforcement with business certainty, especially in fast-moving or innovative sectors.[32] Importantly, enforcement under the proposed framework would require evidence that the firm: (a) holds substantial market power; (b) has engaged in sustained below-cost pricing; and (c) has harmed or is likely to harm competition or acted with exclusionary intent. This ensures that pricing conduct is not penalised unless it is both strategic and anti-competitive.

19. In dynamic or emerging markets - such as rideshare platforms - where multiple firms may be operating at a loss to build scale, the legal test provides a safeguard against overreach. For example, if a ride-sharing platform enters the New Zealand market and competes with other loss-making rideshare operators, enforcement will only proceed if the firm holds substantial market power and its pricing is likely to foreclose equally efficient competitors. If all firms are losing money and no substantial lessening of competition can be shown, the test would not be met. Overall, this option seeks to strike a balance between improving enforcement capability and maintaining clarity and predictability for businesses.

Option three – Requiring courts to have regard to Commission guidance on predatory pricing

20. This option proposes amending the Commerce Act to require courts to have regard to guidance issued by the Commission on what constitutes predatory pricing when interpreting and applying section 36. This would provide the Commission with the opportunity to publish guidance to clarify the economic component of the legal test – specifically, what constitutes below-cost pricing – and make explicit that the likelihood of the perpetrator recouping lost profits is no longer required. This approach would not alter the substantive legal test under section 36, which requires the Commission to establish that the incumbent has substantial

[30] Recoupment is the ability of a firm to recover losses incurred during a period of below-cost pricing by raising prices once competitors have exited the market.
[31] The Court of Appeal has noted, "…merely supplying below cost is not unlawful – it is not a contravention …to offer or sell goods or services at less than cost. The section requires proof of the substantial lessening of competition - not merely aggressive competitive conduct. The purpose or (likely) effect must be more than short term and must impact upon the competitive process in the particular market structure. The mere fact that a participant operates in the market at a loss, and even falls, will not necessarily lessen competition." Port Nelson (CA), n 11, at 571, cited in cited in the Misuse of Market Power Guidelines, Commerce Commission, March 2023.
[32] OECD, https://one.oecd.org/document/DAF/COMP(2005)14/en/pdf.

market power, and its actions have the purpose, effect or likely effect of creating a substantial lessening of competition.

21. The proposed guidance would be issued by the Commission under a statutory authority, similar to the model in section 12B of the Fair Trading Act 1986. Under that provision, the Commission may issue guidance on unfair contract terms, and courts must have regard to it when determining whether a term is unfair. This model does not make the guidance legally binding, but it elevates its status in judicial interpretation, improving consistency and transparency.

22. This approach offers flexibility by allowing the Commission to update its guidance over time in response to evolving market conditions, economic evidence, or to reflect judicial developments. International examples where the courts must consider guidance published by the relevant competition agency include the UK's Competition and Markets Authority (CMA) guidance and the EU's Article 102 enforcement framework.

23. However, in both cases, primary legislation is more descriptive than the Commerce Act about what constitutes an abuse of market power and guidance is quasi-binding on the courts. In the UK, the CMA operates under an administrative enforcement model and has direct powers to issue fines and remedies without going through the courts. This means its guidance plays a more operational and quasi-regulatory role, often forming the basis for enforcement decisions. In contrast, New Zealand follows a judicial enforcement model, where only the courts can impose penalties. As a result, Commission-issued guidance in New Zealand serves a different function – it informs judicial interpretation rather than directing enforcement outcomes – and is likely to be less prescriptive or determinative than its UK counterpart.

24. Therefore, in New Zealand, providing an objective economic test in guidance may be less effective than introducing a statutory test; courts would retain discretion, offering less certainty to new entrants, market incumbents, and the Commission. Introducing guidance that courts are required to have regard to is also novel in New Zealand's competition law framework and the effect it would have on court judgements is untested.

Issue 7: Predatory pricing

	Option One – Status quo	Option Two – Objective statutory test for predatory pricing with a safe harbour	Option Three – Courts having regard to Commission guidance on predatory pricing
Effectiveness	0 Enforcement is rare and difficult, limiting the regime's ability to deter exclusionary pricing and promote competition.	+ 2 Would promote competition and provide confidence to new entrants that the Commission can take timely enforcement action.	+1 Would promote competition by clarifying the economic test, increasing the Commission's ability to take enforcement action. But non-binding nature may limit deterrence and enforcement.
Practicality	0 The status quo is low-cost but impractical, offering little clarity and requiring complex, resource-heavy enforcement.	+ 2 The proposed economic test builds on well-tested international models and is simple to implement and enforce.	+ 1 Courts having regard to Commission guidance is low-cost but limited in practicality, as it lacks legal force and only partially simplifies enforcement.
Certainty	0 Lack of an objective test creates uncertainty for businesses and regulators.	+ 2 A statutory test would offer high legal clarity and predictability.	+1 Guidance could improve certainty, but untested how the Courts will interpret and have regard to guidance. Issuing guidance is at the discretion of the Commission.
Flexibility	0 Case-by-case assessment allows for discretion but may be slow to adapt to evolving market dynamics.	- 2 Less flexible than the status quo, but the test includes safe harbours and rebuttable presumptions, allowing for targeted enforcement while preserving flexibility.	- 1 Less flexible than the status quo, but guidance can be updated more easily than legislation, allowing the Commission to respond to market developments and new evidence.
Regulatory efficiency	0 High evidentiary burden, unclear legal tests, and limited enforcement reduce the regime's efficiency.	+ 1 Clearer evidentiary and economic thresholds support more timely and proportionate enforcement. Will provide appropriate levels of enforcement while minimising regulatory burden compared to the status quo.	+ 1 Increased certainty and ability to enforce. Will provide appropriate levels of enforcement while minimising regulatory burden compared to the status quo.
Overall assessment	0	+ 5	+ 3

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

25. The preferred option – introducing an objective statutory test for predatory pricing – is likely to best address the problem and deliver the highest net benefits. It significantly improves the effectiveness and certainty of the regime by providing clearer thresholds for enforcement and compliance. This could enable the Commission to intervene earlier in cases of exclusionary pricing, as the economic test for below-cost pricing would be clearer and there would be certainty that the Commission did not need to prove recoupment. This approach is consistent with international best practice and economic theory, and reflects lessons from jurisdictions that have successfully implemented similar reforms.

26. While it would represent a departure from Australia's current approach - which does not prescribe specific cost benchmarks - the divergence is not expected to create significant issues. Both regimes focus on substantial market power and harm to competition, and enforcement agencies maintain close coordination through formal protocols. The proposed test would enhance clarity for New Zealand firms without undermining broader regional coherence.

27. Impacts are expected to be most significant for firms with substantial market power, who will need to ensure they employ fair pricing practices. However, regulators can reconstruct cost data using standard accounting records, and firms with substantial market power are generally well-resourced to undertake such assessments.

28. For smaller competitors and new entrants, the changes are likely to be beneficial, as clearer rules will reduce the risk of exclusionary conduct and lower strategic barriers to entry and expansion. Consumers will benefit over time from improved competition that supports lower prices, improved quality, and increased innovation. Empirical studies from the EU and Canada suggest that clearer pricing rules can improve market entry and reduce strategic barriers.[33] The intervention logic rests on both enforcement and behavioural change. By clarifying what constitutes unlawful pricing, the law is expected to deter exclusionary conduct proactively, reducing the need for litigation. Firms with market power will be incentivised to avoid sustained below-cost pricing that could trigger scrutiny, while new entrants will be more confident that anti-competitive pricing will not occur or can be challenged. This increased certainty lowers the perceived risk of entry and expansion, particularly in concentrated markets where dominant firms have historically deterred rivals through predatory pricing.

29. Unintended impacts potentially include a risk of overly cautious pricing behaviour if the test is perceived as being too rigid. However, these risks are mitigated by the proposed safe harbour provisions and the use of presumptive and rebuttable thresholds rather than absolute prohibitions. To manage the risk that the economic test could either over-identify or under-identify predatory pricing, the legal framework includes a three-part test: (a) the firm must hold substantial market power; (b) it must engage in sustained below-cost

[33] European Commission, KD0224126enn_exploring_aspects_of_the_state_of_competition_in_the_EU.pdf

pricing; and (c) the conduct must have the purpose, effect or likely effect of substantially lessening competition in a market. This ensures that pricing is only captured where it is carried out over a sustained period of time and substantially lessens competition. In dynamic markets - such as rideshare or tech platforms - where all firms may be loss-making, the test would not be met unless one firm's conduct is likely to foreclose equally efficient competitors.

30. Overall, the benefits are expected to substantially outweigh the costs, particularly when considering the long-term gains in competition, enforcement efficiency, and market clarity (including from the safe harbours). The benefit-cost ratio is likely to improve over time, as businesses adjust to the new framework and enforcement becomes more predictable and targeted. This reform would bring New Zealand's competition law in line with global standards and enhance the Commission's ability to promote competition.

What are the marginal costs and benefits of the preferred option in the Cabinet paper?

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Regulated groups	Firms with substantial market power may need to reassess pricing strategies, although a more certain test makes compliance more practical. While some firms may face initial compliance costs, international experience shows these are manageable - regulators routinely reconstruct cost data from standard accounting records, and firms with market power are typically well-resourced to do the same. There is a risk of overly cautious behaviour, particularly around discounting and promotional pricing if the test is perceived as rigid, although this risk is	Non-monetised, low	Medium – supported by international experience (including 40 years of EU case law)

	significantly reduced by a safe harbour.		
Regulators	The Commission will need to build capability around the new test, but will improve efficiency through clearer thresholds for enforcement.	Non- monetised, low	Medium – supported by Commission feedback and international experience
Others	Consumers may face higher prices in the short term as the statutory test curtails predatory pricing, removing artificially low prices. However, over the longer-term, prices should lower as competition improves.	Non-monetised, low	Medium – supported by international experience
Non-monetised costs		Non-monetised, medium	Medium
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Clearer rules reduce uncertainty and strategic barriers for smaller competitors and new entrants.	Non-monetised, medium	Medium – supported by international experience
Regulators	Lower evidentiary burden and clearer enforcement thresholds improve efficiency and enable earlier intervention in exclusionary pricing cases.	Non-monetised, high	High – consistent with international experience
	In the long term, consumers will benefit from improved competition in markets where predatory pricing is an issue. However, in the short term, consumers may benefit from	Non-monetised, medium	Medium – supported by international experience

	the effects of predatory pricing (i.e. below-cost prices).		
Non-monetised benefits		Medium – high	Medium - high

Section 3: Delivering an option

How will the proposal be implemented?

201. The proposed amendments will be implemented through standard legislative processes, including drafting by the Parliamentary Counsel Office, Cabinet approval, and passage through Parliament. MBIE will lead implementation, working closely with the Commission, who has been consulted throughout the development of the proposals.

202. The Commission will be responsible for ongoing operation and enforcement of the new provisions, including issuing guidance, managing the new notification and class exemption regimes, and applying new injunction powers.

203. Funding for implementation is expected to be managed within the Commission's existing baseline. The Commission has indicated that, absent new resourcing, implementation may involve opportunity costs for other areas of work. Several of the amendments involve clarification or powers to support existing functions that will be neutral or cost reducing for the Commission.

204. However, some new functions will have resource implications. The statutory notification regime could have resource implications, but this will be at least partially met by an application fee. Notifications may also reduce the need for more resource intensive authorisation applications or investigations. In addition, the Commission's independent review panel may make recommendations on resourcing and prioritisation that could assist with implementation. These recommendations will inform MBIE's and the Commission's approach to operational planning.

205. The costs for developing, enforcing and maintaining pro-competition rules are expected to be met from within the Commission's existing baseline funding, including the allocation set aside to support its market study function. Relying on existing funding will require the Commission to carefully balance its priorities. Without a dedicated funding mechanism, there is a risk that resources may be stretched. However, the ability to carry out inquiries into pro-competition rules is discretionary, unlike some of the Commission's other core functions, such as its merger review and regulatory functions.

206. Most of the reforms are expected to come into effect six months after the Bill receives Royal Assent. This transitional period will allow the Commission and businesses to prepare, including developing and publishing guidance on new processes. MBIE and the Commission will also develop a communications strategy to inform stakeholders of the changes, including updated website content and targeted stakeholder engagement.

207. Implementation risks include uncertainty about how the new tools will be exercised, particularly around the notification regime for collaboration. These risks will be mitigated through proactive guidance and engagement with regulated parties. MBIE will work closely with the Commission to monitor experiences with the updated regime and refine processes as needed.

How will the proposal be monitored, evaluated, and reviewed?

208. The proposed reforms will be integrated into the existing regulatory system under the Commerce Act. MBIE, as the monitoring agency, and the Commission, as the enforcement agency, will jointly monitor the operation of the new arrangements. The Commission will maintain a system issues log to record and respond to any problems raised by regulated parties, industry groups or consumers. MBIE will liaise with the Commission on a regular basis to review implementation progress, emerging issues, and any unintended consequences.

209. The impact of the new arrangements will be monitored through indicators such as:

    a. Outcomes of the new statutory notification regime and class exemptions regime, which will be available in a public register.

    b. Use and impact of strengthened court injunction powers.

    c. Number and nature of section 100 orders issued and any OIA challenges.

210. If other systematic issues emerge (such as difficulties operationalising the new powers, unintended burdens, or failure to deliver improved competition outcomes), MBIE will consider a targeted review of the relevant provisions.

211. MBIE intends to conduct a formal review of the operation of the reforms within five years of commencement. An earlier review may be initiated if monitoring reveals significant problems. The Commission's Annual Reports and MBIE's regulatory stewardship reports will include updates on the impacts of the changes where relevant.

212. In addition to the legislative reforms, the Government initiated an independent review of the governance and effectiveness of the Commission. This review was led by Dame Paula Rebstock, supported by an independent panel with international expertise, and delivered its final report on 13 June 2025, recommending 32 structural and operational changes to strengthen the Commission's governance and capability. This follows rapid growth in the Commission's regulatory responsibilities over recent years, including new functions in retail groceries, retail fuel markets, and retail payment systems. The outcomes of this review will inform changes to the Commission's governance and operational frameworks.