

7 February 2025

Competition Policy Team  
Building, Resources and Markets  
Ministry of Business, Innovation & Employment  
PO Box 1473  
Wellington 6140

Email: [competition.policy@mbie.govt.nz](mailto:competition.policy@mbie.govt.nz)

Dear Sir/Madam

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

**Background**

I am writing to you regarding the discussion document entitled *Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986* (referred to as 'the Discussion Document').

BusinessNZ has previously submitted on various issues relating to the Commerce Act over time, including targeted reviews into specific aspects of the Act. Therefore, we welcome the opportunity to submit on sections of the Act that have not been reviewed for over 20 years. However, it is important to emphasise that while fostering increased competition is a key objective, equal priority must be given to maintaining our competitiveness as an international investment destination.

BusinessNZ believes that when examining issues of competition relevant to a small and isolated country such as New Zealand, competition is not a numbers game, and the number of competitors alone says little about the intensity of competition between them. In addition, while the long-term interest of consumers is paramount; this is best served by competition policy that supports innovation and productivity, creating increased choice and quality at competitive prices. Any kind of short-term focus might create immediate benefits for consumers but at the cost of business investment in new

products and services, making a loss for consumers and the wider economy the potential long-term outcome.

We note that the Discussion Document seeks feedback on the merger control regime and anti-competitive conduct provisions, alongside proposed new tools like industry codes to enhance the Commerce Commission's ('The Commission') ability to promote competition. BusinessNZ strongly supports an environment that ensures competition flourishing in New Zealand, as long as the correct tools are used and the policies deliver economy-wide benefits.

The Discussion Document asks a series of questions in relation to potential changes to the Commerce Act. Rather than answer each question individually, we have outlined some overall thoughts for the various sections of the report.

## **1. Overview and Context of the Review**

### **The State of Competition in New Zealand**

BusinessNZ disagrees with the view in the Discussion Document that market-based studies provide the best indicators of competition. BusinessNZ submitted on the development of market-based studies in 2015, and have long held the view that such studies are an intrusive power that can lead to regulated industries and increased regulation of the economy overall. Therefore, they should be used with great care.

As BusinessNZ outlined in 2015 when we submitted on the initial policy discussions regarding introducing Market Studies into this country, several concerns we had about Market Studies being introduced have now come to pass.

We mentioned back then that an investigation by the Government into an area of competition can be organically generated without the need for some centralised structure. Any government agency tasked with conducting a market study will invariably be tempted to include some form of recommended regulatory change, given the inconsistent and often haphazard way in which regulation has been developed in New Zealand over time.

We also pointed out that centralising a market studies' requirement would not only mean requiring yearly studies to justify public sector staff and resources, but the likelihood of certain sectors being investigated for the sake of it and others reinvestigated within a relatively short timeframe. Realistically, there are only a certain number of industries that are large and complex enough for the Government to investigate through a market studies' process. This means that if the goal is one major study a year, sectors can almost deduce when they will be the next cab off the rank. After that, it is conceivable for the cycle to begin again with a reinvestigation into earlier studies, whether they are justified or not.

Ultimately, a cycle of market studies that is more about a regular work programme than a clearly identified problem can inhibit, rather than promote competition and its flow-on effects towards economic growth. BusinessNZ believes that the establishment of the Ministry for Regulation should have some oversight into the choices and

requirement regarding any future market studies so that a high bar is set before any take place in the future.

***Recommendation: The Ministry for Regulation has an oversight role into the choices and requirement of future market studies.***

### **Australia's competition policy reforms**

The Discussion Document outlines the current work that is being undertaken by the Australian Government regarding their own version of the Commerce Act, which involves a two-year rolling review of competition laws, policies and institutions focused on ensuring they remain fit for purpose.

This review includes the Australian merger regime, with their Government aiming to simplify and strengthen their merger settings. We note that the Discussion Document points out that while alignment of competition laws between New Zealand and Australia can have benefits through reducing compliance burdens, facilitating cooperation between regulators and enabling institutions in each jurisdiction to learn from each other, this does not automatically mean adopting the same laws and processes. BusinessNZ agrees.

Overall, the business community supports moves that lead to closer economic relations between the two countries, but we have always taken the view that any form of harmonisation should only occur if there is a clear net economic benefit to New Zealand. We are increasingly of the view that the debate around trans-Tasman harmonisation has become far too simplistic in regard to regulatory change and as a consequence tends to overlook some fundamental differences when endeavouring to decide what should or should not be considered for harmonisation.

Overall, we see no reason why some form of healthy tension cannot exist to New Zealand's advantage if we believe our laws ultimately provide a better outcome than Australia's.

***Recommendation: That any alignment of competition laws between New Zealand and Australia should only be considered when there is a clear and significant net economic benefit to New Zealand.***

## **2. Mergers**

If we were to look at overseas evidence, mergers are almost always not anticompetitive, which we would argue is also the case for New Zealand. Overall, BusinessNZ believes that New Zealand's current regulations in relation to mergers have generally served the country well and are well-understood and appropriate given it appears the vast majority of mergers do not raise competition issues. While we are open to investigating the need to improve the regulatory framework around mergers, at the same time assessing the competitive effects of a merger can often become a

complex and contested matter. Therefore, the changes need to be well-understood, flexible and low-cost since most mergers do not raise competition concerns.

The Discussion Document outlines five major areas for review regarding mergers. BusinessNZ wishes to comment on a few of them:

**a) The substantial lessening of competition test**

**b) Substantial degree of influence**

When looking at areas (a) and (b) in the Discussion Document, they represent a move towards an updating of the substantial lessening of competition test so that the Act would prohibit certain mergers and acquisitions based on the additional consideration of these effects. In particular, they note that across the Tasman, certain types of acquisitions do not appear to be adequately captured. For instance, 'creeping acquisitions', where a number of acquisitions of small competitors may collectively substantially lessen competition, but in isolation do not. Also, 'nascent competitors', where their possession may not currently result in a substantial lessening of competition, but may pose a serious competitive threat in the long-term. The question then becomes whether New Zealand needs to follow a similar pathway in addressing these areas of concern?

However, BusinessNZ is uneasy about the balance between the additional powers the proposed changes would give the Commission, versus the extent of the problem. Broadly speaking, there needs to be clear evidence that the current regime is unworkable and has clearly led to adverse effects on New Zealand's competitive landscape. We believe the Discussion Document lacks that level of evidence to provide a clear pathway for change.

As discussed above, we increasingly consider that the debate around trans-Tasman harmonisation has become far too simplistic in regard to regulatory change. As a consequence, there has been a tendency to overlook some fundamental differences when endeavouring to decide what factors should or should not be considered for harmonisation.

We add, too, that Australia does not always get it right. Australia's approach around competition law has typically been more restrictive than New Zealand, yet Australian lawyers and commentators have observed at various points in time that New Zealand's approaches, on balance, can often be more workable and understandable than the overly prescriptive approach that is often adopted in Australia.

From BusinessNZ's perspective, we do not believe this is the best course of action to take, and instead support a status quo approach for now. Given the relevant changes in Australia do not commence until the start of 2026, it would be better to wait so that New Zealand can observe whether this is the right course of action, as well as all parties involved having a better understanding of any trans-Tasman implications.

***Recommendation: A status quo approach is adopted, until such time as the success of similar changes in Australia can be determined.***

### **c) Assets of a business**

The Discussion Document outlines a further area of the merger regime that could be improved with greater clarity, namely the definition and treatment of "assets of a business". Given the current definition within the Commerce Act is unclear, this in turn creates uncertainty for various acquisitions, including machinery, licenses and undeveloped land where it is unclear how that land will be used.

While the Australian Amendment Bill has provided greater clarity around the concept of "asset" by going into greater detail, The Discussion Document points out that this level of specificity may be unnecessary in New Zealand given the voluntary merger clearance regime that already exists. BusinessNZ agrees. We see little need to make significant changes to the definition if other mechanisms provide a way in which to address the problem. Also, we believe a high bar needs to be maintained for any changes to definitions given the possibility of unintended consequences and/or potential legal disputes.

BusinessNZ is not wholly against the idea of amending section 47 to refer simply to "assets" or amend the definition of "assets". However, we would want to see a high proportion of submitters making the clear case that such changes would help alleviate any uncertainty in this space. In short, we would not want to see change for the sake of it.

***Recommendation: A status quo approach is adopted, except if a high proportion of submitters make a clear case that such changes to the definition of "assets" would help alleviate any uncertainty in this space.***

### **d) Mergers outside the clearance process**

As the Discussion Document notes, since 1990 the clearance regime under the Commerce Act has operated on a voluntary basis, which sees merger parties applying to the Commission for clearance, but can also elect to proceed with a merger without first obtaining a clearance. However, this latter move can also bring court proceedings and the imposition of pecuniary penalties. To minimise such proceedings changes to the maximum pecuniary penalties for anti-competitive mergers were increased in 2022.

Although New Zealand is one of the few OECD countries with a voluntary merger regime, as stated in the Discussion Document, "*New Zealand's voluntary mergers regime appears to be working well*". However, the 2022 OECD Economic Survey of New Zealand recommended granting the Commission a 'call-in' power to order merger parties to apply for clearance, which could come in various forms.

While it can be useful to consider such recommendations to ensure our competition laws are as effective and efficient as possible, in this instance BusinessNZ takes the

view that *"if it's not broken, don't try and fix it"*. There is little sense in trying to introduce up to three different additional powers to the Commission in relation to non-notified mergers when the status quo has not led to any notable adverse outcomes, particularly when the administering of the current regime involves relatively simple procedures such as educating businesses on the benefits of clearance.

***Recommendation: That the status quo option for the merger clearance process continues.***

### **e) Behavioural undertakings**

We note that the 2024 OECD Economic Survey of New Zealand recommends allowing the Commission to accept behavioural undertaking, which in short are commitments by merging parties to modify their post-merger behaviour to address competition concerns while allowing the merger to proceed.

Given other countries have these in place, BusinessNZ agrees it is useful to examine whether they should also be allowed in New Zealand. However, any investigation into this needs to clearly outline both the costs/risks, as well as the savings/benefits for the country as a whole. While page 21 of the Discussion Document outlines a number of risks and costs, it does not clearly express what the benefits could also be. To remedy this, a number of arguments for their inclusion in merger laws typically include the following points:

- Flexibility in addressing competition issues: They allow regulators to tailor remedies to specific competitive concerns without outright blocking mergers that may have substantial benefits, such as efficiencies or innovation.
- Preservation of market dynamics: By requiring parties to commit to actions like maintaining supply levels, pricing structures, or market access, these undertakings can mitigate anti-competitive risks while preserving competitive conditions in the market.
- Encouragement of pro-competitive outcomes: They can foster fair competition by ensuring that the merged entity does not engage in practices like discriminatory behaviour or foreclosing rivals, thereby promoting long-term consumer benefits.
- Facilitation of cross-border mergers: In global markets, they can accommodate the complexities of multinational mergers, providing a practical solution when structural remedies are not feasible or effective.

One of the more common risks/costs associated with behavioural undertakings that the Discussion Document highlights is the potential cost to the Commission, which can often require robust monitoring and enforcement mechanisms to ensure compliance, which can be resource-intensive. While we would expect any Government department to take into consideration the internal cost of any policy proposals, Governments should consider more than just their own costs when implementing policy changes because these changes often have wide-ranging implications for the country as a

whole. Ignoring these broader positive effects risks creating policies that may save money for the government in the short term but result in either stagnation or significant long-term economic harm.

The Commerce Act review devotes the most options for discussion in the chapter on mergers. This is likely because as stated on page 9 of the Discussion Document, *"improvements to merger settings would enhance the Commission's ability to scrutinise mergers to stop problematic market structures from forming. Effective merger review can reduce the need for future interventions including complex sector-specific regulation"*. In short, there is significant upside if the Commission is able to significantly lift the merger law landscape.

Furthermore, the Discussion Document points out that circumstances where the Commission has declined a merger due to its inability to accept behavioural undertakings are limited at the margin. However, by allowing mergers to proceed under conditions that address competition concerns, such as commitments to maintain fair pricing, ensure supply access, or refrain from discriminatory practices, they make it easier for firms to navigate regulatory approval.

In addition, this flexibility can encourage businesses to pursue mergers that might otherwise be deemed too risky or difficult to get approved. While the extent to which behavioural undertakings can lead to more mergers depends on other factors such as the effectiveness and credibility of enforcement mechanisms and the overall regulatory environment in the country, they can increase the number of approved mergers by providing a clearer pathway for businesses to undertake such proceedings.

Overall, BusinessNZ believes that behavioural undertaking should be given further consideration by the Government. While we understand funding matters may cause issues within the Commission for this option, this could be worked through over time and help send a clearer message to the business community that the pathway towards mergers is relatively easier.

***Recommendation: Behavioural undertakings are given further consideration in New Zealand's merger law landscape.***

### **3. Anti-competitive conduct**

#### **a) Facilitating beneficial collaboration**

In terms of examining and possibly enhancing processes around facilitating beneficial collaboration, BusinessNZ agrees that there is an opportunity to provide further clarity to allow such collaboration and conduct to take place. However, any potential changes need to be pragmatic and workable.

The Discussion Document outlines several major structural challenges facing the economy that require novel and coordinated solutions, ranging from technological innovation to supply chain issues to broader public interest objectives. Because of

this, the need for clear, low cost and swift processes by the Commission are integral to ensure businesses that apply for Commission authorisation meet these challenges.

BusinessNZ has no specific evidence itself to contribute regarding the full extent of this problem. However, if other submitters provide additional evidence that this is an issue on top of what other businesses have already outlined to the Government, we would presume this is an area where further options may need to be considered.

Of the five options that the Discussion Document outlines to facilitate beneficial collaboration under the Commerce Act, at this stage we are not explicitly against any of these options. However, at the same time we are conscious of new processes in this space that seek further information from businesses, which if not well considered and done in consultation with the business community could extend out to information that is not directly relevant to the issue at hand.

In terms of our views on the specific options, Option 4 regarding empowering the Commission, on its own initiative, to make class exemptions, seems to be one way in which to provide a broader solution to positively affect a number of businesses at the same time.

Given costs, we see value in option 5 that seeks to provide an exception for small business from the Commission fee payable to apply for authorisation. However, given there is no formal definition of what is considered a small business, we would expect the Commission to examine existing exemptions in both the commercial and broader regulatory space to ensure it broadly fits with other regulations. Also, given the Discussion Document states that *"the parties would still bear the cost burden of satisfying the Commission that the arrangement should be authorised"*, it again reiterates to us that clear and streamlined processes in this space are essential to ensure the cost burden for small businesses does not become a barrier to apply for the exemption in the first place.

***Recommendation: If supported by other submitters, the Government undertakes further work to facilitate beneficial collaboration under the Commerce Act.***

## **b) Anti-competitive concerted practices**

Unlike issues relating to facilitating beneficial collaboration, BusinessNZ does not see a clear need to consider options regarding perceived issues relating to anti-competitive concerted practices.

Apart from the Discussion Document stating that it is difficult to assess the extent to which this form of co-ordinated conduct is an issue, we are concerned that its introduction may lessen New Zealand's overall market strength. We note that in Australia under the ACCC there has only been one enforcement action since the prohibition was introduced there in 2018. Given Australia's economy is roughly more than seven times larger than New Zealand, on balance it would seem very rare to see an enforcement action taking place on this side of the Tasman.



Also, we are concerned what the introduction of the prohibition will do to the standard practices/services undertaken by a number of our industry associations that are members of BusinessNZ.

Industry associations typically operate as neutral, collective entities that are in a unique position to aggregate and anonymize data. This helps mitigate the risks of misuse or direct competition concerns. By serving as intermediaries, they can ensure that sensitive information is handled on a confidentiality basis, maintaining trust among members.

Furthermore, industry associations have expertise and a broad understanding of the sector, which allows them to manage and analyze data in a way that benefits the industry as a whole. Their role in fostering collaboration and addressing shared challenges enables them to handle sensitive information responsibly for purposes like benchmarking or policy advocacy, which are often key reasons why businesses become members in the first place.

The Discussion Document takes the view that such communication between industry associations and members is an example of 'tacit collusion', where parties have communicated commercially sensitive information with each other to limit competition between them. BusinessNZ questions this view given the real intent by almost all industry associations would typically be to evaluate members' performance relative to peers in a neutral and aggregated manner. This helps their sector as a whole by fostering continuous improvement and competitiveness. At a macro level, various industry associations performing this task would most likely provide a sizeable and ongoing enhancement in market strength. Therefore, on balance, this would likely provide a stronger net economic benefit to the country than a prohibition that is difficult to assess the extent of and typically sees little in the way of enforcement action.

***Recommendation: That the Government maintain the generic prohibitions requiring evidence of a 'contract arrangement or understanding' to establish anticompetitive collusion.***

## **4. Code or rule-making powers and other matters**

### **a) Industry codes or rules**

#### *Reason for investigation*

We note that page 31 of the Discussion Document states that "*the 2024 OECD Economic Survey of New Zealand recommended that New Zealand adopt a more flexible and proportionate response to addressing competition concerns. It recommended a gradual escalation of intervention, from reducing barriers to entry to light-handed regulatory approaches.*" From BusinessNZ's perspective, that sounds very similar to our own broad views around how to improve regulation, which is best exemplified by the approach of traveling up the regulatory pyramid only when clearly

required. This means considering non-regulatory options first, then moving 'up the pyramid' to generic light-handed options, with more stringent options only if previous policy attempts have been unsuccessful

The Discussion Document considers "*one way to do this is to amend the Commerce Act to enable the making of industry codes or rules to promote competition*". Such codes or rules could be a supplement and/or complement to a market study that the Commission would undertake by providing a tool to influence/address business conduct and/or as an intervention that may not justify a full market study.

However, we do not believe the Discussion Document outlines the proper range of options that are available to the Government when tackling the recommendation by the OECD. As we will outline below, we agree that the establishment of industry codes or rules is one way to adopt a more flexible and proportionate response to addressing competition concerns, but it is not the only way. If we were to examine the regulatory pyramid approach, the least intrusive options at the base include educational tools, while the tip of the pyramid involves hard letter law. However, in between are other options such as agreements, voluntary codes, mandatory codes etc. Any policy process that looks at alternative forms of regulation needs to examine all options, not just a subset that may not offer the best outcome.

***Recommendation: That the Government consider a broader range of options to adopt a more flexible and proportionate response to addressing competition concerns.***

#### *How best to use industry codes and rules*

As stated above, BusinessNZ supports industry codes and rules as an alternative option to more stringent regulations, but we are also mindful that such options do not simply become the default position to all perceived competition problems, which could lead to a much larger stockpile of regulations that businesses have to comply with.

Simply put, the justification for industry codes and rules needs to be best aligned with the identified policy problem. The Discussion Document notes that an industry code or rule making power could supplement and/or complement the Commission's market studies by providing a tool in which address concerns identified within the study. Or, an industry code/rule could be used for interventions in sectors that may not justify a full market study.

As we have stated above, BusinessNZ has never supported the current structure of market studies. However, the studies themselves typically involve a substantial amount of resources and engagement from the main players in the market, which culminates in a set of recommendations that have typically been well thought through and often include a number of opportunities for submitters to provide their own views and thoughts throughout the process.

We have greater concerns regarding the alternative situation where an industry code/rule was to be implemented given the Government does not believe a full market

study is warranted. Without the correct checks and balances that have taken place with a market studies process, BusinessNZ believes this alternative situation could simply lead to such codes being overused as a solution to perceived problems that has not seen the same level of policy process rigour that is typically required.

***Recommendation: That industry codes/rules are not simply viewed as an alternative to a market study.***

*Issues to consider to allow for industry codes or rule-making*

Overall, BusinessNZ agrees with the list outlined on pages 32 and 33 regarding issues that need to be considered when allowing for industry codes or rule-making. We believe this provides a useful starting point to ensure a proper policy process regarding whether an industry code should be considered as the best course of action.

We would like to provide some comments on a few aspects of the list that we believe need further consideration.

*Compulsory vs non-compulsory codes*

When determining the best course of action for the introduction of a code, we would like to point out that there is a clear difference between compulsory and non-compulsory codes. Further consideration of the benefits and risks of each option should be a part of the Commission's consideration of policy options, but it should not automatically be assumed that a compulsory code is the best or only option for industry codes.

A case in point is the New Zealand Business Payments Code that BusinessNZ is currently developing. Following the removal of the Business Payments Practices Act 2023, through discussions with the Minister of Commerce and Consumer Affairs, BusinessNZ was tasked with establishing a Voluntary Business Payments Code that relies on self-enforcement by the signatory to it. It is not a prescribed code and is therefore not enforceable in any way.

For this issue, we believe that a voluntary, industry-led code to change payment practices can achieve better outcomes, while limiting the cost to businesses, customers and taxpayers. Overall, the Code we are developing is designed to foster a culture of cooperation, rather than compliance, through businesses working together rather than through Government intervention.

*Private sector involvement in the development of a code*

Any compulsory or non-compulsory code that is developed by the Commission should always include thorough consultation with the sector in its development. All codes should strive to be practical, relevant, and tailored to the specific needs of the industry. Engaging with stakeholders allows for a range of perspectives and expertise, as well as reducing the risk of unintended consequences and ultimately fostering compliance and cooperation.

### *Context and prevalence of industry codes*

As alluded to above where the overuse of industry codes becomes apparent, such sector-specific rules also run the risk of fragmenting the overall competition regime. This could lead to a perception that some sectors are being treated more or less “fairly” than others and undercut the Commission’s role as an objective arbiter of competition in New Zealand.

While we accept that each sector needs to be examined on its own merits as to whether some form of code would best improve competition settings, the Commission would need to be very wary of the interrelationship between the various codes so that there is a consistency and transparency around how each code is determined. For instance, two industries that have a number of broad similarities but have very different code structures may spark concerns that one seems to have significantly less levels of compliance placed upon them. Therefore, such potential differences would need to be factored in and fully explained to the affected parties by the Commission.

***Recommendation: The Government does not take a siloed approach to the increased use of industry codes or rules, but rather a broad understanding of all codes to enhance consistency of treatment.***

In summary, while BusinessNZ supports the steps Government is taking in this space, these must be for the right reasons and within the context of other options to adopt a more flexible and proportionate response to addressing competition concerns.

***Recommendation: That the Government further investigates allowing industry codes or rules, but as part of a broader suite of options to address the recommendations of the OCED.***

#### **b) Modernising court injunction powers**

BusinessNZ has no substantive comments on this issue.

#### **c) Protecting confidential information**

The general view amongst the business community is that increased amounts of information has been requested voluntarily of businesses by the Commission in recent years, particularly since the establishment of market studies. Some of that information is commercially sensitive, which has meant a number of businesses being reluctant to volunteer such information

A lack of trust in the government’s ability to protect sensitive data can greatly discourage cooperation between the public and private sector. If businesses fear potential leaks, misuse, or sharing with competitors, this could all harm their competitive position.

At the forefront of any Government department collecting information from individual businesses should be steps that clearly target data security, maintain confidentiality, and clearly explain the purpose and benefits of collecting the information. The fact that a number of businesses are currently reluctant to voluntarily provide commercially sensitive information to the Commission shows that there is a real and significant lack of trust in the Commission from some in the business community providing such information.

While the Discussion Document outlines the "*preliminary view that the OIA strikes the right balance between protecting confidential information and providing for the public interest in its release*", there is obviously still the perception within sections of the business community that the handing over of commercially sensitive information will cause adverse issues for their operations. Therefore, we question whether the status quo should apply in this case as that outcome would likely not see any material change in perceptions. While we have no strong views on the three enhancements in relation to strengthening confidentiality orders (s 100) that have been proposed, we would support steps to ensure a greater level of trust is obtained in protecting commercially sensitive information, while balancing the principle of public availability.

***Recommendation: Steps are taken to ensure a greater level of trust is obtained in protecting commercially sensitive information, while balancing the principle of public availability.***

#### **d) Minor and technical amendments to the Commerce Act**

BusinessNZ has no substantive comments on this issue.

We thank you for the opportunity to comment, and look forward to next steps.

Kind regards,



Katherine Rich  
**Chief Executive**  
BusinessNZ