

Response to the

**Ministry of Business, Innovation and  
Employment**

on the

**Targeted Review of the Commerce Act  
1986**

9 February 2016

Strictly Confidential



## **1.0 INTRODUCTION**

- 1.1 This submission has been prepared by Bank of New Zealand ('BNZ') in response to the Ministry of Business, Innovation and Employment's (MBIE) consultation document, 'Targeted Review of the Commerce Act 1986' released in November 2015.
- 1.2 BNZ welcomes this opportunity to provide a response to MBIE's consultation document and acknowledges the industry consultation undertaken on this matter.
- 1.3 This submission contains commercially sensitive information and is provided on the basis of strict confidentiality. The contents may only be released by MBIE with BNZ's prior permission.

## **2.0 EXECUTIVE SUMMARY**

- 2.1 Conferring a power to carry out market studies on the Commerce Commission would provide a useful power that fits between the Commission's advocacy and enforcement roles.
- 2.2 The power would need to be exercised with a view to identifying areas where regulatory change would improve a failing market – i.e. a market where there appears to be a lack of effective competition. It should not be used as a "fishing expedition" for enforcement proceedings.
- 2.3 Information gathering powers may be mandatory but should be subject to procedural fairness.
- 2.4 Recommendations should not be binding on government.

## **3.0 SUBSTANTIVE SUBMISSION**

### *Question 45:*

- 3.1 As noted in the Issues Paper there are a number of institutions already capable of undertaking market studies in specific circumstances – including the Productivity Commission, the Electricity Authority and the Commerce Commission itself. However, there is no single, broad power to investigate any market from a competition perspective and make recommendations on how improvements can be made. This appears to be a shortcoming in the legislative framework for regulating competition. BNZ agrees that a power to carry out market studies would usefully fit between the Commerce Commission's advocacy and enforcement roles.

### *Question 46:*

- 3.2 The Commerce Commission should be able to initiate a market study at its own initiative or at the request of the Minister responsible for the Commerce Act in conjunction with the relevant portfolio Ministers – similar to referrals to the Productivity Commission under the New Zealand Productivity Commission Act 2010.
- 3.3. The Commerce Commission is best placed to conduct market studies, although there should be clear separation between those carrying out market studies and those responsible for enforcement. The Commerce Commission should be well placed to identify markets that are not performing efficiently. It is not desirable to set up a new agency to carry out market studies and there is no other agency that is better placed to carry out market studies than the Commerce Commission.
- 3.4 Mandatory information gathering powers are probably necessary. Although it is noted that the Productivity Commission does not have mandatory information gathering powers. Mandatory information gathering powers would need to be exercised subject to procedural fairness – for example a person should not be required to answer a question if the answer would or could incriminate that person. A person needs to be informed of that right before being asked a question. And legal privilege should apply. See section 133 of the Anti-money Laundering and Counter Finance of Terrorism Act 2009.

- 3.5 A market study could identify causes for a failing market, make recommendations for regulatory change supported by the evidence from the market study or recommend that further investigation be undertaken with a view to possibly taking enforcement action. Carrying out a market study should not be used as a fishing expedition to gather information for enforcement action.
- 3.6 A market study's recommendations on regulatory changes should not be binding on the government – similar to recommendations by the Law Commission under the Law Commission Act 1985.

#### **4.0 CONCLUSION**

- 4.1 BNZ is pleased to provide this submission and the information it contains. BNZ is available to discuss any issues raised.
- 4.2 Should MBIE have any questions in relation to this submission, please contact:

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