



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
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Regulatory impact statement

Targeted Review of the Commerce Act 1986: alternative enforcement mechanisms

Agency disclosure statement

This regulatory impact statement has been prepared by the Ministry of Business, Innovation and Employment (“MBIE”).

It sets out potential problems with New Zealand’s alternative enforcement regime for breaches of competition law, and assesses options for addressing these problems.

Although MBIE has identified potential problems with the regime, it has not been able to numerically quantify either the extent to which they exist or their gravity. As a result, problem definition has been largely qualitative.

In assessing options, a quantitative analysis has again been challenging because the implications of a change in a competition law provision are hard to predict and do not lend themselves to numerical evaluation.

There have been no significant time constraints affecting the development of this RIS, but there has been a process constraint, in that, while an Issues Paper was released, no formal Options Paper was prepared. Public consultation was limited to submissions and cross-submissions on the Issues Paper. That Issues Paper focused on problem definition, and only briefly discussed potential options. In addition, it was not limited to alternative enforcement matters, but also included discussion of other Commerce Act issues such as section 36 (misuse of market power) and the possibility of establishing a market studies power. Submissions and cross-submissions focused more on these latter matters than on alternative enforcement.

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Executive summary

Context

The Commerce Commission has at its disposal a number of mechanisms that are designed to resolve competition issues without asking a court to find a breach and impose a penalty: these are called alternative enforcement mechanisms and can be consensual (both parties agree) or adjudicative (a third-party decides).

Negotiated settlements

The major consensual alternative enforcement mechanism is negotiated settlements. Negotiated settlements of Commerce Act matters are open to criticism in particular on the basis that they are difficult to enforce.

In this context, MBIE has assessed the status quo (Option A) against three options for change:

- allowing the Commerce Commission to accept enforceable undertakings (option B), in the same way as similar regimes introduced in New Zealand;
- allowing the Commerce Commission to accept enforceable undertakings, but also prohibiting such undertakings from including an admission of breach (Option C); and
- allowing the Commerce Commission to accept enforceable undertakings, but also prohibiting such undertakings from including an admission of breach and Court-approved pecuniary penalties (Option D).

Option A (status quo) creates an unnecessary risk of settlements going unenforced.

Option C, for its part, creates what officials consider too great a risk of false positive outcomes. A firm under investigation, which need no longer admit to having breached the Commerce Act, may be more inclined to settle with the Commission than currently, even though it considers (and is correct in considering) that its conduct does not breach the Commerce Act. This concern would be further aggravated under Option D, where no pecuniary penalties would be payable.

In this context, MBIE considers that Option B (enforceable undertakings) is the best option. Option B would help to support the purpose of the Commerce Act – to promote the long-term benefit of consumers – by providing greater assurance that firms will abide by the settlements they reach with the Commerce Commission in respect of anti-competitive conduct. In addition, while negotiations would likely be the same length and cost as at present, in the event of a breach of the settlement reached between the Commerce Commission and the firm(s) concerned, enforcement action would become much less resource-intensive.

Cease and desist regime

The major adjudicative alternative enforcement mechanism available to the Commerce Commission is an ad hoc process known as the ‘cease and desist’ regime. Cease and desist orders are akin to interim injunctions, but are made by one of two specially appointed cease and desist Commissioners.

The cease and desist regime has only been used once in 15 years, and is highly unlikely to be used any more often in future. Even if the regime were to be used, it is likely that the Commerce Commission could achieve the same outcome by commencing an injunction procedure before the courts.

In this context, MBIE has assessed the status quo (Option 1) against three options for change:

- allowing private parties to apply for cease and desist orders (Option 2);
- replacing the cease and desist regime with a stop-order type regime, where the Commerce Commission can itself require conduct be ceased (Option 3); and
- repealing the cease and desist regime (Option 4).

In MBIE's opinion, Option 4 (repealing the cease and desist regime) is the best option. The government would no longer need to appoint cease and desist commissioners, and people who might otherwise have acted as cease and desist commissioners would no longer have to decline work due to the conflicts of interest the appointment might create. In addition, by removing the risk of any institution other than the courts from forcibly halting firms' conduct, rights of natural justice would be protected.

By contrast, because of the highly complex judgment involved in determining a breach of the Commerce Act, we are concerned that Option 3 (a stop-order type regime) runs a real risk of false positives in this area, which could undermine the long-term interests of consumers.

Options 1 (status quo) and 2 (allowing private parties to apply for orders), for their part, offer no practical benefit, while representing a drain on resources.

1 Status quo and problem definition

1.1 Background

1. The overall aim of the Commerce Act 1986 is to promote competition in markets for the long-term benefit of consumers. It does so through prohibiting a number of forms of conduct, including:
 - a. Contracts, arrangements, or understandings that have the purpose, or have or are likely to have the effect, of substantially lessening competition in a market. This can include price fixing, restricting outputs, allocating customers, suppliers or territories, and bid rigging.
 - b. A person or business taking advantage of their substantial degree of power in a market for an anti-competitive purpose. This can include tying, bundling, refusal to deal, exclusive dealing, and predatory pricing.
 - c. Mergers or acquisitions that have the effect of substantially lessening competition in a market (unless there are public benefits that outweigh the competitive harm).
2. Except in the case of mergers and acquisitions, standard enforcement of these prohibitions involves the Commerce Commission (or a private plaintiff) taking a firm to court.
3. To avoid the time and expense involved with such an approach, the Commerce Commission has at its disposal a number of mechanisms that are designed to resolve competition issues in a more efficient manner – essentially, by avoiding a full substantive process.
4. We will call these mechanisms ‘alternative enforcement mechanisms’, as they are alternatives to the standard enforcement approach of litigation.

1.2 Status quo

5. Alternative enforcement mechanisms are of two main types: consensual (both parties agree) and adjudicative (a third-party decides).
6. In respect of Commerce Act breaches, New Zealand’s consensual alternative enforcement mechanism is negotiated settlements: the New Zealand courts recognise that the Commerce Commission has an implied authority to negotiate such agreements.¹ These can be concluded either before court proceedings are launched (either as out-of-court settlements or, if a pecuniary penalty is involved, as in-court settlements) or after court proceedings are launched (in which case the settlement is necessarily an ‘in-court’ settlement).
7. New Zealand’s adjudicative alternative enforcement mechanism is an ad hoc process known as the ‘cease and desist’ regime. It was introduced to the Commerce Act in 2001. The Minister of Commerce at the time cited the need for “more timely and effective enforcement of the Commerce Act”.² In this regard, he described applications for cease and desist orders as “an alternative to the Commission seeking interim injunctions³ from the High Court”, although a key

¹ In the case of New Zealand, see for example *Commerce Commission v Telecom* (1994) 5 TCLR 482 at 490 per Cooke P

² Media statement by Hon Paul Swain, ‘Cease and Desist Commissioners Appointments’, 28 March 2002

³ Interim injunctions are one form of standard enforcement mechanism.

difference is that cease and desist orders can be not just interim, but long-term or even permanent.

1.3 Problem definition

1.3.1 Nature of the problem

Negotiated settlements

8. Negotiated settlements of Commerce Act matters are open to criticism in particular on the basis that they are difficult to enforce. If the settlement terms were breached, the Commerce Commission would have to take a civil claim in the High Court. In that civil claim, the Commerce Commission would face the difficulty of proving that it (rather than consumers or other firms) had suffered harm. Even if the Commission could do so, before the court could order that the firm perform its obligations under the settlement, it would have to be convinced that monetary damages were an insufficient remedy.
9. These settlements can also be criticised on the basis that they take up too much time and resource. Submissions suggest that the reason negotiations take this long is because the Commerce Commission generally requires admissions of liability. For example, Russell McVeagh, supported by Genesis, commented in its submission on the Issues Paper that “the nature and scope of admissions are frequently a greater sticking point in settlement negotiations in competition law cases than the level of the penalty itself”.

Cease and desist

10. The cease and desist regime is open to criticism in particular on the basis that it is unnecessary. Since its introduction in 2001, changes have been made to the High Court’s Commercial List,⁴ ex ante regulatory regimes have been introduced in sectors such as telecommunications and post, and the Commerce Commission no longer needs to make an undertaking as to damages⁵ when seeking an interim injunction.
11. The cease and desist regime has also been criticised on the basis that, even if it were necessary, its cumbersome procedural requirements mean it offers no practical advantages over the standard approach of seeking an interim injunction from the courts. Indeed, cease and desist orders have been criticised for being “injunctions by another name”.⁶

1.3.2 Quantification of the problem

Negotiated settlements

How extensive is the problem?

12. The difficulty of enforcing a negotiated settlement has not so far led to any practical problems, because there have not to our knowledge been any instances in which a settlement has been breached. In this context, the enforceability problem remains a theoretical one.

⁴ The Commercial List is intended to speed up the pre-trial stages of proceedings relating to eligible matters. To do this, the court is empowered to give “such directions as it thinks fit for the speedy and inexpensive determination of the real questions between the parties” (see section 24D of the Judicature Act 1908).

⁵ An undertaking as to damages is a signed undertaking that the applicant (for example, the Commerce Commission) will comply with any order to pay damages issued in the future by the court, to compensate the other party for any damage sustained through the injunction.

⁶ Submission of New Zealand Law Society, 17 September 1999, on Supplementary Order Paper No 203 on the Commerce Amendment Bill, at p.4

13. The Commerce Commission has not been able to quantify for us the time and resource involved in a negotiation settlement. Some submitters suggested that they could be significant, but no supporting data was provided.⁷

What is the gravity of the problem?

14. Where there was a breach of a negotiated settlement, it would be a serious problem. Significant resources would need to be devoted to enforcing its terms. If initial talks were not fruitful, this would require the launching of a High Court case. During this time, the Commerce Commission would have fewer resources available to undertake other enforcement of the Commerce Act. If the Commerce Commission subsequently lost its case (for example, because it could not demonstrate that it had itself suffered any harm), then the firm in question would remain free to breach the terms of its settlement agreement, and this conduct would be likely to harm outcomes for consumers. Furthermore, this judicial confirmation of the lack of enforceability of negotiated settlements could see the Commerce Commission eschew settlements in future cases in favour of taking firms to court. This would significantly increase the Commission's workload and – barring budget increases – may mean less serious breaches of the Commerce Act are unable to be litigated.
15. Unless it is disproportionate to the benefits (of which we have no solid evidence), the possibility that negotiations take significant time and effort is not as serious an issue. Care must be taken to ensure due process is respected and that both parties feel heard. This all takes time. Furthermore, the result of a successful negotiation is in fact to avoid the greater cost and time involved in a court case.

Cease and desist regime

How extensive is the problem?

16. The cease and desist regime has only been used once in 15 years, and is highly unlikely to be used any more often in future. Even if the regime were to be used, it is likely that the Commerce Commission could achieve the same outcome by commencing an injunction procedure before the courts.
17. Furthermore, the level of protection for firms' right to natural justice is so high that it is difficult to see how – in terms of cost and timeframes – the cease and desist regime adds much at all to the ability of the Commerce Commission to seek interim and permanent injunctions from the courts. In this regard, in Australia, the Dawson Review final report was released in April 2003. It concluded that "there is little, if anything, to suggest that the New Zealand procedure for obtaining a cease and desist order would be an improvement upon the procedure for obtaining an interim injunction".⁸

What is the gravity of the problem?

18. Retaining an unnecessary cease-and-desist regime means that the government is expending resources for no benefit. In 2002, 2007 and 2013, appointment processes were undertaken to fill the two cease and desist commissioner positions. If the status quo is kept, this process must be repeated again in 2018, and every five years after that.
19. The cease and desist regime also imposes costs on the two cease and desist commissioners. Apart from the time taken to apply for the post, and familiarise themselves with the role, they face opportunity costs during their tenure. For example, one former commissioner wrote to the then Minister of Commerce to complain that his position had created a conflict of interest which

⁷ Although we do not know how long settlement negotiations take, we do know that it is significantly shorter than the time taken to litigate an alleged breach of the Commerce Act.

⁸ Australian Committee Report, 2003, at p.108. Cease and desist regimes were also rejected in Australia in the earlier Hilmer (National Competition Policy) Report of 1993

meant he had to decline to take a number of legal cases, even though – due to the lack of cease and desist requests – he earned nothing from holding his post. This is only a minor issue from a regulatory viewpoint, but in the context of the near-zero benefits generated by the cease and desist regime, it assumes some importance.

2 Objectives / Criteria for assessment

2.1 Introduction

20. MBIE has identified a number of options for reform. Together with the status quo, these options must be assessed against a given set of criteria.
21. In this section, MBIE sets out the criteria it has concluded should be used to assess the different options.

2.2 Criteria

Criterion 1: Long-term benefit of consumers

22. Alternative enforcement mechanisms (such as negotiated settlements and the cease and desist regime) should help to promote the long-term benefit of consumers by bringing early resolution to cases of conduct that breach the Commerce Act.
23. In this regard, alternative enforcement mechanisms should minimise the number of cases which are unnecessarily dealt with by standard enforcement measures such as court proceedings. At the same time, they should avoid as much as possible any ‘false positive’ outcomes that check, interrupt or reverse conduct that is not actually a breach of the Act (e.g. ‘innocent’ parties should not feel pressured to settle).
24. There should also be no undue legal obstacles to their being pursued or enforced, to minimise the risk of false negatives. Both false positives and false negatives can undermine the long-term benefit of consumers.

Criterion 2: Minimises compliance costs

25. Alternative enforcement mechanisms should not unduly drain the resources of the parties involved. Options will therefore be assessed against how well they minimise compliance costs – not just for private firms, but for government as well.
26. In this regard, alignment of legislative provisions with other provisions is sometimes a useful way to minimise compliance costs (e.g. because an agency administering both provisions need only master a single approach). However, alignment of alternative enforcement mechanisms under the Commerce Act with alternative enforcement mechanisms under other New Zealand legislation has not been retained as a distinct criterion. This is because, as Russell McVeagh submitted, “the settlement processes under each Act have been designed in contemplation of the different aims and needs of each respective Act”.

Criterion 3: Protection of natural justice

27. Administrative authorities – including the Commerce Commission and the cease and desist Commissioners – are bound by procedural requirements known as the rules of natural justice. Those rules are of two main kinds: adequate opportunity to be heard (*audi alteram partem*); and an unbiased decision-maker (*nemo iudex in causa sua*). Such requirements, which parties can enforce through judicial review proceedings, are particularly important in Commerce Act cases, given the potential for significant (multi-million dollar) penalties.

28. In order to minimise the risk of costly judicial reviews, but also as a simple recognition of the importance of natural justice in Commerce Act cases, the Ministry considers that, in its assessment of the options in this RIS, it should consider the extent to which each option respects both parties' natural justice interests.
29. The interests of the firm agreeing to settle are of course relevant, but so are the interests of the plaintiff and those of third parties, notably those who may have standing enough to seek judicial review.

3 Options and impact analysis

3.1 Description of the options

30. For the negotiated settlement regime, MBIE officials have identified four main options:
 - a. retaining the status quo;
 - b. allowing the Commerce Commission to accept enforceable undertakings;
 - c. replacing the current regime by:
 - i. allowing the Commerce Commission to accept enforceable undertakings; but also
 - ii. prohibiting such undertakings from including an admission of breach.
 - d. replacing the current regime by:
 - i. allowing the Commerce Commission to accept enforceable undertakings; but also
 - ii. prohibiting such undertakings from including an admission of breach; and
 - iii. prohibiting such undertakings from including Court-approved pecuniary penalties.
31. For the cease and desist regime, MBIE officials have identified four main options:
 - a. retaining the status quo;
 - b. allowing private parties to apply for cease and desist orders;
 - c. replacing the cease and desist regime with a stop-order type regime; or
 - d. repealing the cease and desist regime.

3.1.1 Negotiated settlement options

Option A: Status quo

32. Option A is the current regime. Parties under investigation, or defending court proceedings, may approach the Commission to make a settlement proposal, which will include draft admissions of breach of the Commerce Act and details on how non-compliance has been or will be rectified.
33. Commission staff work with the parties and their lawyers to produce a final proposal suitable for submission to Commissioners for their consideration.
34. If the Commission wishes to include a pecuniary penalty in the settlement, as punishment for the breach of the Commerce Act, then the High Court will need to approve the penalty, under section 80 of the Commerce Act. This is so whether the case is at the investigation stage or the court proceedings stage.

Option B: Establishing an enforceable undertakings regime

35. Option B would involve establishing an enforceable undertakings regime, which would retain most the substantive elements of the current settlements regime.
36. An enforceable undertaking is essentially a negotiated settlement granted special status under legislation allowing it to be immediately enforceable as if it were a court decision. The first enforceable undertakings regimes in New Zealand were introduced by the Takeovers Amendment Act 2002 (for the Takeovers Panel) and the Securities Amendment Act 2002 (for the Securities Commission, now known as the Financial Markets Authority), and were based on

Australian provisions. Five more enforceable undertakings regimes have since been introduced, in 2007, 2009, 2010, 2011 and 2013:

Enforceable undertakings regimes in New Zealand⁹

Year introduced	2002	2002	2007	2009	2010	2013	2015
Act	Takeovers Act 1993 (ss 31T / 31U)	Financial Markets Authority Act 2011 (ss 46-47)	Unsolicited Electronic Messages Act 2007 (ss 34-36)	Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (ss 81-83)	Employment Relations Act 2000 (ss 223B / 222C)	Fair Trading Act 1986 (ss 46A / 46B)	Health and Safety at Work Act 2015 (s 123)
Agency that accepts undertaking	Takeovers Panel	FMA (formerly the Securities Commission)	The "enforcement department" (DIA)	AML/CFT supervisors (RBNZ, FMA or DIA)	MBIE labour inspectors (with employer)	Commerce Commission	WorkSafe

37. As is the case under the status quo, the parties would be free, but not obliged, to include in the terms of their settlement an admission of breach of the Commerce Act.
38. The legislation would provide that, in the event of a breach of the undertaking, the Commerce Commission could apply to the District or High Court, as appropriate, for an enforcement order (a much less onerous process than proving a breach of the settlement).

Option C: 'undertakings regime' without admission of breach

39. Option C would involve establishing an enforceable undertakings regime that differed from the current settlements regime. The key difference would be that the firm being investigated would not be able to admit to a breach of the Commerce Act. Such a restriction would, to our knowledge, be unique in the world.
40. Enforceable undertakings would be available to the parties whenever a settlement was available i.e. when the breach was civil (such as Part 2 of the Commerce Act) or criminal (such as section 102 of the Commerce Act).
41. The enforceable undertakings regime under option C would differ from the status quo as follows:
 - a. for the firm, there would be no admission of breaching the Commerce Act;
 - b. for the Commerce Commission:
 - i. negotiation of a settlement is likely to be less costly and more likely to end in agreement; and
 - ii. there would be a simple and guaranteed method of enforcing the settlement, in the event of breach (by getting an enforcement order from the High Court).
42. We have considered whether an enforceable undertakings regime should exist alongside, or should replace, the Commerce Commission's court-recognised authority to conclude settlement agreements.

⁹ Enforceable undertakings also exist under the Telecommunications Act 2001, but as a mean of avoiding regulation, rather than as a means of settling a dispute about breach of the Act.

43. This raises a number of questions. For example, assume that Option C is adopted. Because the risk of a firm not abiding by a settlement is theoretical only, the Commerce Commission may decide that it values an admission much more than it values the enforceability guarantee that an undertaking would provide. If the settlement regime continues to exist alongside Option C, then the Commission could insist that it be used, and the undertakings regime could become a white elephant.
44. We therefore conclude that the options for change examined in this RIS should replace, rather than sit alongside, the current settlement process. In other words, for Option C and D, a legislative provision would provide that the Commerce Commission could agree a settlement only within the context of an enforceable undertaking.

Option D: 'Undertakings regime' without admission or penalties

45. Option D is the same as Option C, except that the legislation would prohibit the parties to an undertaking from seeking court authorisation to include pecuniary penalties for the (non-admitted) breach of the Commerce Act. Nevertheless, parties could still agree to *compensatory* payments to affected parties, for the alleged breach of the Act. There would also be a risk of pecuniary penalties for any future breach of the undertaking (as opposed to the original 'breach' of the Act). Like Option C, there is no international precedent for Option D.
46. The enforceable undertakings regime under Option D would differ from the status quo as follows:
 - a. for the firm:
 - i. there would be no admission of breaching the Commerce Act; and
 - ii. there would not be a risk of pecuniary penalties for the alleged breach (beyond compensation payments for loss caused),
 - b. for the Commerce Commission:
 - i. negotiation of a settlement is likely to be less costly and more likely to end in agreement; and
 - ii. there would be a simple and guaranteed method of enforcing the settlement, in the event of breach (by getting an enforcement order from the High Court).

3.1.2 Cease and desist regime options

Option 1: Status quo

47. Option 1 is the current regime. Cease and desist orders are made by one of two specially appointed cease and desist Commissioners.
48. Before granting an order, the Act requires that a cease and desist Commissioner be satisfied that:
 - a. there is a prima facie case that a person has breached either Parts 2 or 3 of the Commerce Act; and
 - b. it is necessary to act urgently:
 - i. to prevent a particular person or consumers from suffering serious loss or damage; and
 - ii. in the interests of the public.

49. The effect of a cease and desist order is “to restrain conduct for any period and on any terms that are specified in the order”.¹⁰ In this sense, it is akin to an injunction – interim or permanent. Cease and desist orders can alternatively be ‘cease and do’ orders (akin to mandatory injunctions) when cessation of conduct would not remedy an anti-competitive situation.¹¹
50. Applications for a cease and desist order can only be made by an employee of the Commerce Commission – they are not open to private parties, such as firms concerned about the conduct of another market participant.¹²
51. Where a cease and desist order has been issued, the Commerce Commission can take suspected breaches of the order to the courts, which can impose a penalty not exceeding \$500,000.¹³

Option 2: Allowing private parties to use cease and desist regime

52. Option 2 would be to extend the cease and desist regime to private parties, allowing firms that allege anti-competitive conduct (and not just the Commerce Commission) to seek cease and desist orders.

Option 3: Replacing cease and desist with a stop-order regime

53. Option 3 would be to modify the cease and desist regime to resemble what is promising to be a more successful ad hoc adjudicative procedure: the stop order regime now in place under the Financial Markets Conduct Act 2013 (notably section 462). Under this option, the Commission would not be required to seek an order from independent cease and desist Commissioners – instead it could (like the Financial Markets Authority) issue stop orders itself. As well as “stop” orders, which require conduct to cease, it could issue “direction” orders, which would require positive action (compare section 469 of the Financial Markets Conduct Act).

Option 4: Repeal of the cease and desist regime

54. Option 4 is repealing the cease and desist regime. It would not be replaced with any alternative. The Commerce Commission would need to apply to the courts if it wished to obtain an interim injunction. We do not propose to set out any framework for such applications.¹⁴

3.2 Assessment of options against criteria

55. In this section, we assess the different options for action against the criteria discussed in Chapter 2.

3.2.1 Negotiated settlement options

Criterion 1: Long-term benefit of consumers

56. MBIE has rated the ‘negotiated settlement’ options according to which is most likely to best promote the long-term benefit of consumers.

¹⁰ See section 74A(2) of the Commerce Act

¹¹ See section 74A(3)(a) of the Commerce Act, which provides that an order “may require a person to do something only if the Commissioner is satisfied that restraining the person from engaging in the conduct will not restore competition, or the potential for competition, in a market”. One respondent to the consultation on the Issues Paper, Matthews Law, doubted however “that the Cease & Desist Commissioners could (or would) in fact mandate positive action”.

¹² See section 74B of the Commerce Act

¹³ See section 74D of the Commerce Act

¹⁴ Such a framework already exists in the rules of equity. We do note however that, exceptionally, some legislation sets out a right to issue interim injunctions: see for example sections 480-481 of the Financial Markets Conduct Act 2013.

57. In this regard, Option A (status quo) seems to have been functioning well. Negotiated settlements have been reached on a regular basis: between 2002 and July 2016, there were 78 settlements (55 that involved the court and 23 that did not). In the same period, there were 20 proceedings ultimately adjudicated by the court.
58. Furthermore, there is no evidence that innocent parties are being pressured to enter settlements, and firms that have signed settlements have complied with them.¹⁵
59. However, as noted in the problem definition, although only a theoretical risk, if a firm were to breach a negotiated settlement, it is possible the Commission would struggle to enforce the settlement. This would mean anti-competitive conduct could resume.
60. Option B (enforceable undertakings) would address the theoretical risk of a firm failing to abide by a settlement, and the associated obstacles to enforcement.
61. Option C (enforceable undertakings without admission) would allow the Commerce Commission and the firm(s) concerned to explore an approach that:
 - a. could be more attractive to firms because it involves no admission of liability ; and
 - b. would provide the Commission (and consumers) with added assurance (compared to the status quo) that the terms of the settlement would be abided by.
62. However, there may be a slightly raised risk of “false positives” under Option C.
63. By way of explanation, a firm under investigation, which need no longer admit to having breached the Commerce Act, may be more inclined to settle with the Commission than currently, even though it considers (and is correct in considering) that its conduct does not breach the Commerce Act. As Matthews Law noted in its submission: “In our experience, parties often settle with the Commission on a simple cost-benefit analysis i.e. it would be cheaper to settle now and ‘get it over with’ than to defend the charges in court – even if the chances of success or a lower penalty are good.” This means that, under Option C, outcomes that check, interrupt or reverse conduct that is not actually a breach of the Act may become more likely.
64. Option D (enforceable undertakings without admission or penalties) would have the same pros and cons as Option C, except that it would likely materially increase the risk of false positives, since there would be little downside for a firm to settle, beyond reputational issues and the risk of paying compensatory payments to affected parties.

Criterion 2: Minimises compliance costs

65. MBIE has rated the ‘negotiated settlement’ options according to which is most likely to minimise compliance costs for both firms and government.
66. The problem with Option A (status quo) has been explored in the problem definition. Although the Commerce Commission was not able to quantify the absolute level of resources required to negotiate a settlement, submitters agreed that agreeing on the nature and scope of an admission can be the most time-consuming part of a negotiation. In addition, if there is a breach of the terms of the settlement, the Commerce Commission would face a heavily resource-intensive process of attempting to prove that breach and demonstrate standing to demand enforcement.
67. Option B (enforceable undertakings) would have some advantages over the status quo. The continued potential for discussion over an admission of breach would mean that negotiations would likely be the same length and cost as at present. However, in the event of a breach of the

¹⁵ The Commerce Commission stated in their submission on the Issues Paper that they “have not faced a situation where a party to a settlement agreement (administrative or court-approved) has ultimately reneged on the agreement.”

settlement reached between the Commerce Commission and the firm(s) concerned, enforcement would become a much quicker and simpler matter for the agency.

68. Option C (enforceable undertakings without admission) would, for its part, probably reduce the time and costs associated with negotiating a settlement, as well as those associated with enforcing one. As Russell McVeagh stated in its submission: "Creating a settlement regime that did not require admissions of breach would likely significantly decrease the time and cost involved in reaching settlement agreements".
69. Option D (enforceable undertakings without admission or penalties) would even further reduce the time to negotiate a settlement, as there would be no need to discuss (and ask a court to approve) the level of any pecuniary penalty.

Criterion 3: Natural justice

70. Option A (status quo) generally appears to protect firms' right to natural justice. They are consensual arrangements which the firms concerned are free not to sign, and we are not aware of firms being placed under undue pressure to sign them.
71. In addition, as noted in Russell McVeagh's response to the Issues Paper, "[t]he requirement that financial penalties be included only with the approval of the High Court provides a check on the NZCC's power to impose penalty-like sanctions on defendants. Indeed, this aspect of the settlement regime does not weaken the regime, but acts to provide appropriate limits on the NZCC's powers."
72. Option B (enforceable undertakings) would also seem to protect parties' interests. They remain voluntary and – with the exception of their enforceability – are to all intents and purposes identical to the status quo.
73. Option C (enforceable undertakings without admission) would, on balance, offer less effective natural justice protection than continuing with the current settlements regime. Although it would avoid any risk of infringing the rights of the defendant, it would seem to artificially limit the right of the Commerce Commission (and the consumers it protects) to hold the defendant to account for wrongdoing.
74. Option D (enforceable undertakings without admission or penalties) would support natural justice for the defendant, through no risk of pecuniary penalties for the (non-admitted) breach of the Commerce Act. However, like Option C there is a risk that the Commission's rights to natural justice (and, as a result, those of consumers) could be undermined.

Negotiated settlements: summary of assessment

75. Below is a summary of MBIE’s assessment of Options A, B, C and D against the four criteria retained:

Negotiated settlements: overall assessment of different options

	Option A: Status quo	Option B: Enforceable undertakings	Option C: Enforceable undertakings without admission	Option D: Enforceable undertakings without admission or penalties
Long-term benefit of consumers	✓	✓✓	✗	✗✗
Minimises compliance costs	✗✗	✗	✓	✓✓
Natural justice	✓	✓✓	✓	✓

76. MBIE considers that Option B (enforceable undertakings) is the best option. Option B would help to support the purpose of the Commerce Act – to promote the long-term benefit of consumers – by providing greater assurance that firms will abide by the settlements they reach with the Commerce Commission in respect of anti-competitive conduct. In addition, while negotiations would likely be the same length and cost as at present, in the event of a breach of the settlement reached between the Commerce Commission and the firm(s) concerned, enforcement action would become much less resource-intensive.

77. Option C has been assessed as not far behind Option B. The key deciding factors between Options B and C are that:

- a. Option C creates too great a risk of false positive outcomes, where firms cease conduct even though they do not believe that they have committed a breach of the Commerce Act. This means ‘wrong answers’ which could undermine the long-term benefit of consumers; and
- b. Option C harms the right of the Commerce Commission (and consequently of the consumers its actions are designed to protect) to hold firms fully accountable when they do breach the Commerce Act.

3.2.2 Cease and desist options

Criterion 1: Long-term benefit of consumers

78. Option 1 (retaining the cease and desist regime as is) does not appear to promote the long-term benefit of consumers. The existence of the cease and desist regime is not, for example, helping to bring early resolution to cases of conduct that breach the Commerce Act, because it is not being used.

79. Yet, by the same token, the cease and desist regime does not appear to be undermining the long-term interests of consumers. When a cease and desist order was once issued – in 2006 in respect of Northport’s refusal to allow International Stevedoring Operations Ltd to undertake general cargo marshalling services in the Marsden Point port – it was issued with the consent of

the defendant, suggesting that neither party considered that lawful conduct was being unduly interrupted.

80. Overall, we conclude that the existence of the essentially unused cease and desist regime is neutral in terms of Criterion 1.
81. Option 2 (opening the cease and desist regime to private parties) would allow private parties that allege anti-competitive conduct (and not just the Commerce Commission) to seek cease and desist orders. An independent cease and desist commissioner would still make the final decision on whether to issue such an order. We consider that this option is unlikely to better promote the long-term interests of consumers than the status quo because, based on the submissions received, there appears to be no “pent up demand” from private parties to avail themselves of the regime. This makes sense – they would face the same cumbersome process that has made the Commission reluctant to seek cease and desist orders.
82. Option 3 (amending the cease and desist regime to resemble the stop order regime under the Financial Markets Conduct Act 2013) would be an improvement on the status quo, if only because it is more likely to be used. Stop orders can be issued more quickly and with less cost than if a court is involved, making them an attractive option for an enforcement agency. The Financial Markets Authority has issued one stop order so far since it gained the power to do so in 2013.
83. There is, however, a real risk of false positives. If an agency is able to issue a stop order when it is “satisfied” that a Commerce Act provision has been or is likely to have been breached (a much lower threshold than for cease and desist commissioners), then there is a possibility that it will check or interrupt conduct that is pro-competitive or competitively neutral. This is not such a risk in the context of the Financial Markets Conduct Act, because of the type of conduct regulated under that legislation – conduct such as disclosure of information, where a decision that the obligation has been breached – involves much less judgment than a decision under, say, sections 27 and 36 of the Commerce Act.
84. Option 4 (repealing the cease and desist regime) is, in our view, essentially equivalent to the status quo, in terms of promoting the long-term interests of consumers, since the cease and desist regime is not being used. We do not consider that its absence would create a legislative gap: recourse to the Courts for an interim injunction is an adequate fall-back position.

Criterion 2: Minimises compliance costs

85. Weighed against the limited benefits it brings, Option 1 (the current cease and desist regime) is a resource-heavy option. For the government, the status quo requires the appointment of cease and desist commissioners every five years. Candidates must be found, interviewed, and – where successful – appointed. For the Commerce Commission, should it decide to seek a cease and desist order, it must negotiate a cumbersome procedure and work to meet a high threshold test. And for the cease and desist commissioners, there is an “opportunity cost”: one has previously written to the Minister complaining that, although he receives no work on cease and desist matters, he had to decline some private consultancy work on the basis of the conflict of interest his position created.
86. Option 2 (opening the cease and desist regime to private parties) would be equivalent to the status quo. Commissioners would have to be appointed and, if any party sought an order, they would need to go through a cumbersome procedure.
87. Option 3 (a stop order regime) would be less resource-heavy than the status quo. The government would no longer have to appoint cease and desist commissioners, and the Commerce Commission would no longer have to go through those commissioners to halt conduct it considered was a potential breach of the Commerce Act. Nevertheless, the

Commerce Commission would need to devote resources to learning, mastering, and potentially applying its new powers.

88. Option 4 (repealing the cease and desist regime) would be the most clear improvement on the status quo. The government would no longer need to appoint cease and desist commissioners, and people who might otherwise have acted as cease and desist commissioners will no longer have to decline work due to the conflicts of interest it might create.

Criterion 3: natural justice

89. Option 1 (retaining the cease and desist regime, as is) is generally respectful of natural justice.
90. Cease and desist orders can only be sought following an investigation and the compilation of a report into the alleged breach. Under section 74B(d), the party against whom an order is sought must be given an opportunity to access the relevant information held by the Commerce Commission, to make a written submission, and – if they do not consent to the terms of a proposed order – to have the matter determined following a hearing. At such a hearing, the cease and desist Commissioner must, under section 74C, permit the Commerce Commission and the party against whom an order is sought to appear and give evidence, to be represented by counsel, to call witnesses, and to cross-examine witnesses.
91. Cease and desist orders can then only be issued by the independent cease and desist Commissioner and, under section 74A, only where he or she is satisfied that the Commission has a prima facie case, and that it is necessary to act urgently.
92. The fact that the cease and desist order can be permanent (there is no time limit set in the Act) does raise some concerns – it might accord better with natural justice if orders stood only for as long as was reasonably necessary to allow proper consideration on the merits of the Commerce Commission’s case. However, overall, MBIE considers that the safeguards established for the cease and desist process ensure that firms’ right to natural justice is protected.
93. Option 2 (opening the cease and desist regime to private parties) is little different from the status quo in terms of natural justice. IAG, in its submission on the Issues paper, claimed that “[t]here may be the potential for the abuse of these mechanisms by competitors if the cease and desist regime was opened up in that way” but, with the strong protections for investigated firms built into the process, we do not see how this could realistically happen.
94. Option 3 (amending the cease and desist regime to resemble the stop order regime) would in our assessment be a regression from the status quo, in terms of natural justice. The firm facing a potential stop order has fewer rights in the run-up procedure (e.g. the stop-order regime provides no express right to call or cross-examine witnesses). And there would be no independent decision-maker issuing the stop order.
95. Option 4 (repealing the cease and desist regime) would best protect natural justice interests. This is because it would remove the risk of any institution other than the courts from forcibly halting firms’ conduct (the Commerce Commission would need to ask the courts for an interim injunction).

Cease and desist regime: summary of assessment

96. Below is a summary of MBIE’s assessment of Options 1, 2, 3 and 4 against the four criteria retained:

Cease and desist regime: overall assessment of different options

	Option 1: Status quo	Option 2: Extended cease and desist regime	Option 3: Stop order type regime	Option 4: Repeal cease and desist regime
Long-term benefit of consumers	-	-	✗	-
Minimises compliance costs	✗	✗	✓	✓
Natural justice	✓	✓	✗	✓✓

97. In MBIE’s opinion, Option 4 (repealing the cease and desist regime) is the best option. The government would no longer need to appoint cease and desist commissioners, and people who might otherwise have acted as cease and desist commissioners would no longer have to decline work due to the conflicts of interest the appointment might create. In addition, by removing the risk of any institution other than the courts from forcibly halting firms’ conduct, rights of natural justice would be protected. The Commerce Commission would need to approach the courts to obtain an interim injunction.
98. By contrast, because of the highly complex judgment involved in determining a breach of the Commerce Act, we are concerned that Option 3 (a stop-order type regime) runs a real risk of false positives in this area, which could undermine the long-term interests of consumers.
99. Options 1 (status quo) and 2 (allowing private parties to apply for orders), for their part, offer no practical benefit, while representing a drain on resources.

4 Consultation

4.1 Public consultation

4.1.1 Introduction

100. An issues paper was released on 17 November 2015. Submissions were due on 9 February 2016, and 39 submissions were received. The issues paper proposed criteria for assessing the adequacy of current alternative enforcement mechanisms, applied those criteria to the cease and desist regime and the settlements regime, and indicated at a high level the types of alternatives that might exist to replace or amend these.
101. A cross-submission process was launched on 9 June 2016 so that stakeholders could critique the 39 submissions MBIE received, as well as some additional information provided by the Commerce Commission by letter dated 2 June 2016. 25 responses were received by the deadline of 21 July 2016. Few of the cross-submissions discussed the issue of alternative enforcement mechanisms.
102. The Issues Paper sought respondents' comments on:
- a. what criteria should be used to assess the status quo and any options for change;
 - b. whether, using these criteria:
 - i. the current settlements regime should be amended; and/or
 - ii. the current cease and desist regime should be amended or repealed.

4.1.2 Comments on criteria for assessment

103. The Issues Paper proposed four criteria for assessment: the long-term benefit of consumers; respect for natural justice; simplicity; and the current need for alternative enforcement mechanisms. The 'simplicity' criterion has been reframed in this RIS as "minimises compliance costs". The 'current need for alternative enforcement mechanisms' criterion has been removed.
104. There was very little comment on the choice of criteria. Russell McVeagh made the only substantive suggestions.
105. Its comments on 'simplicity' were a factor in our reframing of that criterion. Russell McVeagh stated: "While simplicity is a desirable aim, it is important to recognise that allegations under the Commerce Act are typically factually complex, resting on complex arguments about closeness of competition, costs of supply and appropriate State limits on freedom to contract. Responding to and assessing such allegations often requires substantial economic analysis. If alternative enforcement mechanisms fail to recognise the complexity intrinsic in Commerce Act disputes, this may result in what the Ministry refers to as 'false positive' or 'type 1' outcomes, which would interrupt conduct that is not actually a risk to the long-term benefit of consumers."
106. Russell McVeagh further asked that MBIE consider, for each option, the need for procedural fairness, the need for rights of appeal, and the need for checks and balances on the Commission. We consider that these are all elements of the 'natural justice' criterion and, as such, have been taken into account.

4.1.3 Comments on settlements regime

107. Respondents to the Issues Paper generally agreed that the settlements regime should be enhanced through the use of enforceable undertakings. While they considered that breach of a settlement under the status quo was a low risk, they felt that the added certainty that a settlement would be easily enforceable was still worthwhile.
108. On the issue of whether an enforceable undertakings regime should prohibit the admission of a breach of the Commerce Act (as proposed in Options C and D of this RIS), Meredith Connell submitted that settlement without admission of breach “is entirely inconsistent with the purpose of a regulator and belies the point of an enforcement regime”. As noted in section 3 of this RIS, MBIE sides with Meredith Connell on this issue, on the basis that such an approach reduces the natural justice rights of the Commerce Commission as the plaintiff.
109. Finally, 2degrees submitted that “in any undertakings regime the Commission should have the flexibility to accept both structural and/or behavioural undertakings to address potential competition issues that may arise”. However, it did recognise that “divesting of assets will not address all competition issues and in some cases is likely to be disproportionate, for example where remedies such as wholesale access could address the competition concern”.
110. In response, we note that none of the seven existing undertakings regime in New Zealand expressly includes or excludes the possibility of structural undertakings. Whether they will be appropriate is a matter for general principles of proportionality. We do not therefore consider it necessary to expressly include (or exclude) structural undertakings.

4.1.4 Comments on cease and desist regime

111. Respondents to the Issues Paper generally agreed that the cease and desist regime should be repealed. The Commerce Commission, for example, submitted that “injunctions provide a more cost effective and efficient method of stopping harmful conduct”.
112. One respondent, Alan Lear, did however state that he believed the cease and desist regime “has the potential to be more cost effective and timely than High Court proceedings”. In addition, 2degrees preferred the option of replacing the regime with a stop order-like approach. It noted that in Australia, the ACCC “has a specific stop-go power that applies in telecommunications markets. The Telecommunications Competition Notice regime recognises that anticompetitive conduct can have fast-acting results/long term damage on competition and potential new entrants. Under this regime, the ACCC can issue a competition notice in respect of conduct which it believes has the effect of substantially lessening competition”.
113. As noted in section 3 of this RIS, MBIE is concerned that Option 3 (a stop-order type regime) runs a real risk of false positives in this area, which could undermine the long-term interests of consumers.

4.2 Agency consultation

114. MBIE officials sought inter-agency comments on the Issues Paper before it was released, notably from Treasury, the Ministry of Justice, the Ministry for Primary Industries, and the Commerce Commission.

115. MBIE also sought inter-agency comments on its draft policy advice.

116. On the settlements regime:

- a. The Ministry of Justice considers that, because it involves a simplified enforcement process for settlement breaches, the proposal to introduce an enforceable undertakings regime will necessarily remove some of the natural checks and balances provided by the court. However, MoJ does not object to the proposal on this basis, provided that parties are able to enter into the agreements freely and there is a fair process for negotiating terms.
- b. The Commerce Commission agrees with MBIE's advice to introduce enforceable undertakings. It suggests that MBIE should model Commerce Act undertakings provisions on the Fair Trading Act enforceable undertakings. MBIE concurs.
- c. Treasury and MPI have no concerns with MBIE's proposal to introduce an enforceable undertakings regime.

117. On the cease and desist regime:

- a. The Ministry of Justice is satisfied that the removal of this regime would not pose any natural justice issues, as parties remain able to pursue a similar outcome by filing injunction proceedings in the High Court and would therefore be subject to normal court processes. MoJ expects the flow-on effects for the High Court to be relatively minor, given the reported low demand for cease and desist orders.
- b. The Commerce Commission agrees with MBIE's advice to repeal the cease and desist regime.
- c. Treasury and MPI have no concerns with MBIE's proposal to repeal the cease and desist regime.

5 Conclusions and recommendations

5.1 Settlements regime

118. On the basis of its assessment of the four options against the four criteria retained, which was informed by two rounds of public consultation, MBIE considers that the best option is Option B (enforceable undertakings).

5.2 Cease and desist regime

119. On the basis of its assessment of the four options against the four criteria retained, which was informed by two rounds of public consultation, MBIE considers that the best option is Option 4 (repeal the cease and desist regime).

6 Implementation plan

6.1 Settlements regime

120. MBIE has recommended that an enforceable undertakings regime be established: Option B. This would be a relatively simple exercise. An exposure draft of the implementing legislation could be prepared and consulted on.

6.2 Cease and desist regime

121. MBIE has recommended that the cease and desist regime be repealed. Given the lack of controversy in submissions on this point, and the simplicity of implementing the solution, we do not consider that there is a further need for public consultation on this matter.

122. Because the term of the current cease and desist Commissioners is due to expire in 2018, and section 77AA(1) expressly requires the appointment of cease and desist commissioners, it would be preferable to make sure the relevant bill was adopted in 2017. Failing that, to minimise costs, it would be possible – rather than launching a search for new cease and desist commissioners – to consider “rolling over” the appointments of the current commissioners until the necessary legislation was adopted. This would of course be subject to their agreement.

7 Monitoring, evaluation and review

7.1 Settlements regime

123. MBIE has recommended that an enforceable undertakings regime be established. We propose to evaluate the use of the regime three years after implementation. The evaluation would be based on the use made of the regime (e.g. comparing that use against use of settlements prior to implementation) as well as on interviews with the Commerce Commission and industry.

7.2 Cease and desist regime

124. MBIE has recommended that the cease and desist regime be repealed. This would not require specific monitoring, evaluation or review.

125. However, MBIE would continue to monitor the operation of New Zealand's competition laws and the performance of the Commerce Commission. This would include the adequacy of standard and alternative enforcement mechanisms.