



## COVERSHEET

<b>Minister</b>	Hon Andrew Bayly	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Competition Settings Review Release of Discussion Document Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986	<b>Date to be published</b>	2 December 2024

### List of documents that have been proactively released

Date	Title	Author
November 2024	Competition Settings Review Release of Discussion Document Promoting Competition in New Zealand – A Targeted Review of the Commerce Act 1986	Office of the Minister for Commerce and Consumer Affairs
13 November 2024	Competition Settings Review: Release of Discussion Document ECO-24-MIN-0261 Minute	Cabinet Office
September	Competition Settings – Opportunity to Review New Zealand’s Competition Settings to Lift Productivity	Office of the Minister for Commerce and Consumer Affairs
25 September 2024	Competition Settings – Opportunity to Review New Zealand’s Competition Settings to Lift Productivity ECO-24-MIN-0206 Minute	Cabinet Office

### Information redacted

**YES / NO** (please select)

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

**In Confidence**

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Policy Committee (ECO)

**COMPETITION SETTINGS REVIEW: RELEASE OF DISCUSSION DOCUMENT: *PROMOTING COMPETITION IN NEW ZEALAND – A TARGETED REVIEW OF THE COMMERCE ACT 1986***

**Proposal**

- 1 This paper seeks agreement to release a discussion document on New Zealand’s merger and anti-competitive conduct settings contained within the Commerce Act 1986 (**the Commerce Act**).

**Relation to government priorities**

- 2 I propose to consult on making targeted reforms to New Zealand’s competition settings to promote business competition and lift New Zealand’s economic productivity. Our coalition agreements and the speech from the throne set out the Government’s focus on lifting productivity and economic growth to increase opportunities and prosperity for all New Zealanders.

**A Competition Strategy can support the Government’s vision of lifting productivity**

- 3 Competitive and dynamic markets are critical to economic productivity and the welfare of New Zealanders. Competition incentivises firms to compete and innovate through producing goods and services at a price and quality that consumers demand.
- 4 Competition law and policy needs to keep pace with market developments to address and deter conduct that harms competition and decreases productivity. Much of the Commerce Act has not been reviewed for over 20 years. Major competition reforms are underway in Australia to help address concerns about markets becoming increasingly concentrated and to lift productivity. The Commerce Act is based on the equivalent Australian competition law. Maintaining regulatory alignment, where that makes sense for New Zealand (e.g. when these reforms are productivity enhancing and promote certainty for businesses operating across the trans-Tasman market) helps support the Government’s vision.
- 5 Over the past decade, advances in competition law in overseas jurisdictions have left some New Zealand settings out of step with international best practice, as noted by the 2024 OECD Economic Survey of New Zealand. A review of New Zealand’s competition settings that apply across all sectors of the economy will help ensure that:
  - 5.1 all businesses have incentives to compete fairly and rigorously,

- 5.2 we have the right settings in place to enable all mergers that are likely to result in a substantial lessening of competition to be reviewed by the Commerce Commission (**the Commission**),
  - 5.3 businesses have more certainty about the circumstances where they can cooperate for the benefit of consumers and when collaboration reduces competition to the detriment of consumers and the economy.
  - 5.4 New Zealand's competition law settings keep up to date with new and emerging developments, including in the digital economy.
- 6 Aligning with international best practice does not necessarily mean adopting the same laws as overseas but using overseas experience to inform New Zealand's own competition settings.

## Background

- 7 On 25 September 2024, Cabinet Economic Policy Committee (**ECO**) agreed to progress four workstreams to review New Zealand's competition settings [ECO-24-MIN-0206 refers].
- 8 The attached discussion document covers three of these workstreams including a review of:
- 8.1 merger settings to ensure the Commission has the tools required to prevent mergers that create competition concerns,
  - 8.2 tools to address anti-competitive behaviour and support a fair playing field for business to keep pace with market developments and provide more certainty to firms on what constitutes anti-competitive conduct; and
  - 8.3 the benefit of providing the Minister with an industry rule-making power as a tool to remedy a market failure.
- 9 ECO also noted that the Minister of Commerce and Consumer Affairs would return to Cabinet for approval to release a discussion paper for public consultation, which sets out the problem definition, issues, and options by the end of 2024.

## Summary of issues covered in the discussion document

### *The merger regime*

- 10 Mergers generally support the effective operation of markets, allowing the merging parties to achieve efficiencies and thus enhance the merged firm's ability and incentive to compete. However, mergers in markets with high barriers to entry may lead to increases in market power and harm to consumers, along with reduced dynamism, innovation and lower productivity.
- 11 Effective and efficient merger settings are well-targeted and ensure that mergers that may harm competition can be scrutinised by the Commission. This reduces the risk of subsequently needing complex sector specific regulation in markets where competition is not working well to the detriment of consumers, and the economy.

- 12 The merger regime in the Commerce Act was last reviewed over 20 years ago, and with Australia also reforming its merger law, it is timely to assess whether the regime is fit for purpose. This discussion document tests whether:
- 12.1 the Commerce Act enables the Commission to assess all mergers that are likely to harm competition including a series of small acquisitions by a large firm (i.e. ‘creeping acquisitions’) over a short period of time. These types of acquisitions have become a more common feature of some markets including funeral homes, dentistry and veterinary services.
  - 12.2 whether the Commission should be able to accept behavioural commitments from merging parties to address anti-competitive effects especially where the merger is expected to create welfare-enhancing benefits for consumers. Behavioural undertakings are commitments that merger parties make as part of a review of their prospective merger about how they will behave post-merger to remedy possible competition concerns.<sup>1</sup> These behavioural commitments could, for example, include providing greater transparency to consumers regarding the price and quality of relevant goods and services or a commitment to provide third parties with continued access to essential facilities or supply chains.
- 13 Competition regulators overseas, including in Australia and the United Kingdom, are able to accept behavioural undertakings when assessing mergers. They have also taken steps to provide stronger oversight of creeping acquisitions.
- 14 The annexed discussion document seeks submissions on these and other issues to ensure New Zealand’s merger regime keeps pace with market developments and the Commission has the tools it needs to deliver good outcomes for consumers and the economy. It seeks views on whether:
- 14.1 the current ‘substantial lessening of competition’ test used by the Commission captures all mergers that are likely to harm competition.
  - 14.2 the current ‘substantial degree of influence’ test captures all the circumstances in which a firm may have material influence on the activities of another.
  - 14.3 the definition of assets of a business is sufficiently clear including in relation to partial acquisition.
  - 14.4 there are circumstances where mergers that currently fall outside the clearance process may harm competition and warrant scrutiny by the Commission e.g. creeping acquisitions and mergers that take out a nascent competitor.
  - 14.5 there are circumstances where the Commission should be able to accept behavioural undertakings from merging parties to remedy anti-competitive effects arising from the merger.

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<sup>1</sup> They differ from structural undertakings which are commitments to dispose of assets or shares to address competition concerns as part of the merger.

*Anti-competitive conduct*

- 15 Part 2 of the Commerce Act prohibits certain types of restrictive trade practices by firms, whether that be single firms acting alone, or multiple firms forming illegal agreements. These provisions help protect consumers from the costs and harm associated with behaviour that limits competition in markets. Such behaviour also undermines the important role that competition plays in promoting efficiency and innovation.
- 16 There are also some classes of conduct that harm competition but are not prohibited under Part 2 of the Commerce Act. For example, compared to many jurisdictions, concerted practices are not currently unlawful under the Commerce Act. Concerted practices relate to co-ordinated conduct between two or more businesses designed to avoid competition, but where there is no contract, agreement or understanding between them. An example is ‘price signalling’ by competitors so that they may coordinate future price changes which can increase prices in the same way as price fixing, which is clearly prohibited.
- 17 However, it is important that the Act clearly differentiates between anticompetitive collusion and welfare-enhancing collaborations to provide certainty to business. Many challenges facing the economy, such as the need to research and develop low emissions fuel and ensuring consumers have access to essential services during supply chain disruptions, can benefit from business collaboration. Commission guidance and mechanisms to clear collaborative activities or authorise arrangements are available but could be enhanced. For example, the advocacy group *Fired Up Stilettos* identified the high costs of obtaining authorisation from the Commission as a barrier to it collectively bargaining to protect members’ rights.
- 18 The discussion document invites submissions on whether:
- 18.1 anticompetitive concerted practices (i.e. price signalling) should be prohibited under the Act.
- 18.2 steps can be taken to provide more certainty to businesses on the differentiation between anti-competitive and welfare-enhancing collaboration.

*Code or rule-making powers and other matters*

- 19 Previous years have seen the introduction of complex, sectoral specific legislation to address competition concerns. The 2024 OECD Economic Survey of New Zealand recommended that New Zealand adopt a more flexible and proportionate response to competition concerns. This review explores if industry codes or rules could be a flexible and efficient tool to address competition issues in concentrated sectors where current competition tools are insufficient.
- 20 The discussion document invites submissions and discussion on the potential for the Act to be amended to empower the making of industry codes or rules, in the form of secondary legislation. This could provide a flexible and efficient tool to reduce barriers to entry in markets and promote competition.

- 21 Codes have been used in Australia to remedy a range of market failures, including unfair business conduct, access to essential facilities and information asymmetry for consumers and businesses. A full impact assessment would be required before such measures could be introduced.

*Modernising court injunction powers*

- 22 The Act sets out powers of the court to grant an injunction, on application of the Commission or any other person. The injunction powers in the Commerce Act only allow the court to stop harmful conduct. The discussion document consults on the potential benefit of enabling the court to order a party to do something, such as remedy the harm created (i.e. performance injunctions).
- 23 Most of the sector-specific regimes that the Commission is responsible for allow for both restraining and performance injunctions (e.g. s 48 and s 49 of the *Retail Payment System Act 2022*). Allowing for the Commission to require parties to both stop harmful conduct and/or require parties to take action to remedy harm can give greater protection for private parties damaged by that conduct.

*Protecting confidential information*

- 24 The Commission relies upon businesses voluntarily supplying it with information to enable it to perform its functions effectively. Often this information is commercially sensitive. In managing the use of this information, the Commission seeks to balance parties' rights and expectations as to the confidentiality of information they are supplied against:
- 24.1 the need to carry out its functions effectively and efficiently, including testing the information provided,
  - 24.2 its legal obligations under the New Zealand Bill of Rights Act 1990, the Privacy Act 2020 and the Official Information Act 1982, including the principle of availability of information.
- 25 Some businesses are reluctant to voluntarily provide commercially sensitive information to the Commission if it could be released to a competitor or another business with which they have a business relationship. The document explores whether further regulatory change is desirable.

**Next steps**

- 26 Submissions on the discussion document issues will inform policy development, including regulatory impact analysis. Once policy development is complete, I will return to seek Cabinet agreement to those policy proposals and drafting instructions.

*Indicative timeline*

- 27 An indicative timeline is included below.

Stage	Timeframe
Release of discussion document	November
Public consultation	Completed by end of December
Analysis and, if required, further targeted stakeholder engagement	Q1 2025
Report back to Minister and Cabinet	By end of March 2025

## Impact Analysis

### Cost-of-living implications

28 There are no direct cost-of-living implications associated with the release of the discussion documents.

### Financial implications

29 No financial implications for the Crown would arise from releasing the attached discussion document.

### Regulatory impact statement

30 MBIE’s Quality Assurance Panel has reviewed the discussion document and considers that it partially meets the quality assurance criteria. The panel confirms the discussion document contains sufficient impact analysis to support Cabinet’s decision to release it.

31 The Ministry for Regulation has advised that the discussion document does not require a regulatory impact statement. Regulatory impact analysis will be part of the policy development process for future work.

### Climate implications of policy assessment

32 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that CIPA requirements do not apply to this proposal as it is not expected to result in any significant, direct emissions impacts.

### Population implications

33 The release of this paper or the discussion document will not have any impacts on particular population groups.

### Human rights

34 The discussion document includes some proposals that engage human rights. For example, some of the proposals outlined relating to protecting confidential information may engage the right to freedom of expression (s 14 of the New Zealand Bill of Rights Act 1990). Other proposals that affect penalties, enforcement and

search powers may also have implications. Advice will be provided on the human rights implications at the time that Cabinet agreement is sought on specific proposals following consultation.

### Use of external resources

- 35 No external resources were used in development of policy advice contained in this paper nor the attached discussion document.

### Consultation

- 36 The Treasury, Ministry for Regulation, Ministry for Primary Industries, Ministry of Justice, Ministry of Foreign Affairs and Trade, and the Commerce Commission have been consulted on the attached discussion document. The Department of Prime Minister and Cabinet has been informed.

### Communications

- 37 MBIE will release the discussion documents for public consultation on its website for six weeks and will contact stakeholders during this time. The Minister of Commerce and Consumer Affairs will consider opportunities to announce the publication of the discussion document, should an appropriate event align with the timing of its release.

### Proactive release

- 38 The contents of this paper will be proactively released within proactive release guidelines with appropriate redactions if needed.

### Recommendations

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

- 1 **note** that on 25 September 2024 ECO agreed to progress four workstreams to review New Zealand's competition settings [ECO-24-MIN-0206];
- 2 **note** that the attached discussion document progresses three of these workstreams;
- 3 **note** that the attached discussion document invites submissions on Parts 2 and 3 of the Commerce Act 1896, code making powers and minor technical amendments;
- 4 **approve** the release of the discussion document at Appendix 1 for public consultation beginning in November 2024;
- 5 **authorise** the Minister for Commerce and Consumer Affairs to make minor amendments and refinements to the discussion document before it is released;
- 6 **note** that the Minister for Commerce and Consumer Affairs will report back to Cabinet in March 2025 on the outcome of the consultation and seek agreement to policy decisions.



**IN CONFIDENCE**

Authorised for lodgement

Hon Andrew Bayly

Minister of Commerce and Consumer Affairs

**IN CONFIDENCE**

## Appendices

Appendix One: Draft discussion document: