Introduction

1. Webb Henderson welcomes the opportunity to provide its views on the Ministry of Business, Innovation and Employment's (**MBIE**) targeted review of the Commerce Act 1986 (**Act**) (**Review**). Webb Henderson represents a range of client interests in the competition and regulatory space in New Zealand and by virtue of its work is closely connected to the issues raised in MBIE's discussion document.

2. Webb Henderson has also contributed to the joint submission made on behalf of expert competition lawyers at Minter Ellison, Russell McVeagh and Chapman Tripp (**Joint Submission**).

3. This is the first wide-ranging review of the competition law settings since the Commerce Act was passed in 1986. In the last 5 years or so, the Commission has almost doubled in scale and past governments have materially expanded its scope of responsibility with industry-specific regulatory regimes. The tools the Commission has to promote competitive markets have also expanded to include criminal cartel prosecutions and market studies. At the same time, we have seen the business community struggling to understand the reasons for many of the interventions.

4. Overall, our experience is that the Commission has strong technical expertise, a culture of careful analysis and independence, and it benefits from its strong relationships with its international equivalents. At the same time, competition regulators internationally are under real pressure to be efficient, and to promote growth[1], so it is now more critical than ever for the Commission, MBIE and the Minister of Commerce to be aligned on the structure and settings that will make the Commerce Commission most efficient and effective. In short, this review is extremely timely.

Summary

5. The top three things we would like to see out of this review to promote growth and improve cost of living through more effective competition settings, relate to:

   (a) easing the regulatory burden on small business;

   (b) streamlining Commission processes; and

   (c) encouraging business collaboration, particularly around R&D and energy.

6. Small businesses are estimated to make up over 90% of businesses in New Zealand, but earn only about a quarter of total GDP[2]. To ease compliance costs for them, and allow them to flourish as a hub for innovation, we would like to see a small business threshold developed, below which businesses would not be required to file for merger clearance and would not be subject to investigation for breach of the Commerce Act, other than for criminal cartel conduct. This could be included either in the legislation or it could fall under any wider power provided to the Commission to grant blanket exemptions (discussed below).

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[1] See, for example, https://www.reuters.com/world/uk/uks-reeves-says-antitrust-chair-stepped-down-over-strategic-difference-2025-01-22/

[2] According to 2022 data 97% of New Zealand businesses are small enterprises and these small enterprises contribute over 25% of New Zealand's GDP. See https://www.mbie.govt.nz/dmsdocument/27313-small-business-factsheet-2022-pdffloundered and in this KPMG report: https://assets.kpmg.com/content/dam/kpmg/nz/pdf/2022/05/kpmg-budget-2022.pdf

7. We see real benefits in the implementation of a de minimis threshold, applying to both mergers (similar to the UK)[3] and (civil) behavioural arrangements[4], to ensure the Commission's resources are being spent on cases where the public costs of enforcement do not outweigh the size of the market affected by the behaviour. It also means small businesses do not have to spend limited resources on compliance, and limits the impression the Commission is "beating up on the little guy".

8. To keep the Commission's processes efficient and effective, we would also like to see an independent Hearing Officer appointed, who would be in charge of monitoring Commission processes. Any New Zealand person engaging with the Commission in the performance of its functions under the Commerce Act could ask the Hearing Officer to intervene or express a view, that the Commission would be bound to follow, to deal with process and interim measure issues such as:

   (a) confidentiality protections required before a complaint can be lodged or a party agrees to participate in a merger process,

   (b) if there is a need to accelerate a merger process (for example, if there is a degradation of the business or other prejudice arising from the delay), or accelerate an investigation (including for mental health consequences for individuals involved in the investigation),

   (c) to express a view on whether the scope of an information request is too wide, or

   (d) for a "stop now" letter or other interim steps by the Commission to limit restraints on competition before the Commission has been able to investigate.

   This role would be a blend of the role of Hearing Officer, that works well in the EU,[5] and the former role of "cease and desist Commissioner" which was a good concept, but not well specified and so not well used, and subsequently disestablished.

9. Finally, to encourage R&D and growth-orientated business collaboration, we would like to see a framework of block exemptions, proposed by either MBIE or the Commission, to grant category exemptions for certain types of business collaborations that meet specified criteria, for example to support certain sustainability initiatives.

10. The EU has had a framework of "block exemptions" for decades. This approach works well to provide more certainty to the business community to get on and come up with strategies to grow markets in and outside New Zealand without constantly looking over their shoulders to consider how the Commission might, more sceptically, evaluate them.

11. Webb Henderson appreciates the opportunity to provide both its own views of the firm as well as our contributions to the Joint Submission. We hope our input will be helpful in informing improvements to New Zealand's competition law regime. We look forward to and welcome further opportunity for engagement with MBIE on these issues.

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[3] See for example, CMA, Exceptions to the duty to refer, 2 January 2025, section 2 ('de minimis' exception) https://assets.publishing.service.gov.uk/media/67766be19d03f12136308cfc/CMA64_Mergers_-_exceptions_to_the_duty_to_refer.pdf

[4] See, for example, EU Notice on agreements of minor importance, 20 August 2014, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0830(01)

[5] See here: https://competition-policy.ec.europa.eu/hearing-officers/faq_en

	Question	Answer
Issue 1 – the substantial lessening of competition test		
1	What are your views on the effectiveness of the current merger regime in the Commerce Act? Please provide reasons.	See Joint Submission.
2	What is the likely impact of the Commission blocking a merger (either historically, or if the test is strengthened) on consumers in New Zealand? Please provide examples or reasons.	The impact depends on the facts of the merger, it is not possible to generalise. If pro-competitive mergers are blocked (Type 1 error), that erodes market efficiency and productivity. If anti-competitive mergers are permitted (Type 2 error), that increases concentration to the detriment of consumers. Like all competition regulators, the Commission is typically more concerned about Type 2 errors than Type 1 so typically will err to block. This is much more of an issue for dynamic markets (tech, telco, software etc) than traditional markets (construction, energy, retail etc). The Joint Submission advocates for the Commission to be able to accept behavioural remedies. These are well suited to dynamic markets, where structural remedies can lack sufficient flexibility or timeliness.
3	Has the 'substantial lessening of competition' test been effective in practice in preventing mergers that harm competition? Please provide examples of where it has, or has not, been effective.	The substantial lessening of competition test, as interpreted by the New Zealand Courts, sets a low bar to decline mergers. The test has not been the issue when mergers that lessen competition have been allowed to proceed. Our observation is that the effects of mergers on concentration levels in markets are often only felt many years after the merger has completed. A number of mergers that would be pointed to as potentially having created concentration levels that were too high, with consumer detriment resulting, were cleared under the old dominance threshold.
4	Should the 'substantial lessening of competition' test be amended or clarified, including for: a) Creeping acquisitions? If so, should a three-year period be applied to assessing the cumulative effect of a series of acquisitions for the same goods or services? b) Entrenchment of market power (eg	See Joint Submission. We do not see examples of creeping acquisitions as a real concern in New Zealand. The negative impact of such a regime - setting a lower bar for the size of transaction caught, and disincentivising private equity investment - is significantly greater than the suggested harm arising. Entrenchment of market power is the same thing as substantial lessening of competition, particularly with the low bar to decline mergers. Behavioural remedies will assist with managing issues arising from the acquisition of small and nascent competitors. A "de minimis threshold" is required to keep the Commission focussed on transactions where the cost of its involvement is lower than the potential benefit of preventing the transaction from proceeding. See cover letter and Joint Submission.

	including acquisitions relating to small or nascent competitors)? c) In relation to just the merger provisions or wherever the test applies in the Commerce Act? If so, how? Please provide reasons.	
5	How important is it for the 'substantial lessening of competition' test in the Commerce Act to be aligned with the merger test in Australian competition law, for example, to provide certainty for businesses operating across the Tasman and promote a Single Economic Market? Please provide reasons and examples.	It is important for the test in New Zealand to be aligned with Australia because otherwise there is limited judicial precedent on which to advise clients, and also to keep in check the exercise of power by the Commission without the need to bring costly litigation.
6	How effective do you consider the current merger regime is in balancing the risk of not enough versus too much intervention in markets?	See Joint Submission and comments above.
Issue 2 – Substantial degree of influence		
7	Do you consider that the current test of 'substantial degree of influence' captures all the circumstances in which a firm may influence the activities of another? If not, please provide examples.	See Joint Submission
8	Should the Commerce Act be amended to provide relevant criteria or further clarify how to assess effective control? If so, how should it be amended? Please provide reasons.	See Joint Submission

Issue 3 – Assets of a business		
9	Do you consider the term "assets of a business" in section 47 of the Commerce Act is unclear or unduly narrows the application of the merger review provisions in the Act?	See Joint Submission.
10	If you consider there is a problem, how should the phrase be amended? For example, by: a) referring simply to "assets"? or b) should the definition of "assets" in the Commerce Act be further refined?	See Joint Submission
Issue 4 – Mergers outside the clearance process		
11	What are your views on how effectively New Zealand's voluntary merger regime is working?	See Joint Submission
12	Do you consider non-notified mergers to be an issue in New Zealand? Please provide reasons.	See Joint Submission
13	What are your views on amending the Act to confer additional powers on the Commission to strengthen its ability to investigate and stop potentially anti-competitive mergers? In responding, please consider the merits of each of the options: a) A stay and/or hold separate power b) A call-in power	See Joint Submission

	c) A mandatory notification power for designated companies.	
Issue 5 – Behavioural undertakings		
14	Should the Commerce Commission be able to accept behavioural undertakings to address concerns with proposed mergers? If so, in what circumstances?	See Joint Submission. Yes. This power is well overdue.
Anti-competitive conduct		
Issue 6 – Facilitating beneficial collaboration		
15	Has uncertainty regarding the application of the Commerce Act deterred arrangements that you consider to be beneficial? Please provide examples.	Yes. This has occurred on many occasions. While client confidentiality prevents us from giving specific examples, our experience is that this is particularly a risk in the ESG space. Since there is often no or limited financial gain from collaboration on ESG matters, there is no new revenue stream arising from the transaction to fund the costs of engaging economists and lawyers to make the case to the Commission as to why the collaboration does not breach the prohibition. The balancing test required by the Commission in its *Anytime* clearance decision (clearance declined) is highly fact specific, and requires a nuanced weighing of incentives created by the collaboration. While the Commission has indicated it has an open door, the fact-specific nature of the inquiry means that it cannot provide much guidance without having engaged in the forensic process to determine whether the collaboration passes the test. Where there is no obvious financial gain out of the process, and the risk of getting it wrong is that the parties are potentially subject to criminal sanctions for cartel conduct, the risk/reward calculus is simple and the transaction does not proceed.
16	What are your views on whether further clarity could be provided in the Commerce Act to allow for classes of beneficial collaboration without risking breaching the Commerce Act?	We recommend MBIE or the Commission be given the power to issue binding guidelines on the types of collaboration that will not be subject to criminal sanction, and the types of transaction that presumptively would be pro-competitive.
17	What are your views on the merits of possible regulatory options outlined in this paper to mitigate this issue?	See response to question 16 above. We see benefits in (at a minimum): - A de minimis threshold for SME collaborations - A block exemption for specific types of ESG collaboration - A block exemption for franchise arrangements

		- Binding exemption from criminal (not civil) prosecution for specified types of collaborations that have an efficiency rationale so are not sham collaborations.
18	If relevant, what do you consider should be the key design features of your preferred option to facilitate beneficial collaboration?	See responses to questions 16 and 17 above.
Issue 7 – Anti-competitive concerted practices		
19	What are your views on whether the Commerce Act adequately deters forms of 'tacit collusion' between firms that is designed to lessen competition between them?	We do not agree with the framing of this question, as it suggests that firms in oligopolies are acting with a "design" to lessen competition. In our experience, most often they are simply acting rationally with the information available to them. We do not see any benefit in the introduction of a "concerted practices" prohibition. In our view its introduction in Australia was influenced by a much stricter view taken by their Courts on the meaning of an "understanding". Against the backdrop of New Zealand's less stringent test for what constitutes an "understanding", it would introduce considerable uncertainty, leading to inefficient market outcomes. To engage with issues where 1-2 major market participants act in parallel to limit entry and expansion by smaller competitors, the EU concept of collective dominance/market power could be employed. The benefit of this framing over concerted practices is that it requires high market power before the prohibition is triggered, which concerted practices does not (potentially catching behaviour that does not cause material harm to a market). There are also strict criteria for its application which have been developed in European case law over time. Note, we also do not believe that any notion of collective market power is appropriate for merger control, because examining collective dominance as a matter of evidence of past actions in the context of a specific practice alleged to have substantially lessened competition in a market is materially different to the hypothetical exercise necessary to postulate, and assess the likelihood of such behaviour on a forward-looking basis in merger control analysis.
20	Should 'concerted practices' (eg, when firms coordinate with each other for the purpose or effect of harming competition) be explicitly prohibited? What would be the best way to do this?	No. See comment above regarding the framing of this question.

	Code or rule-making powers and other matters	
Issue 8 – Industry Code or Rules		
21	Do you consider that industry codes or rules could either: a) Fill a gap in the competition regulation regime or b) Prove a more efficient and appropriate response to addressing sector-specified competition issues rather than developing primary legislation? Please provide reasons	Yes, through a combination of the block exemption regime described above, and industry codes that are promoted by the industry and are generally self-regulating. Where industries can promote and self-regulate an effective code, then it would add to the efficiency of the market if the MBIE/Commission could support those codes with appropriate block exemptions. Audit or reporting requirements, call in powers, and the ability of the Commission to enforce the code, can be accommodated within the framing of the codes without the need for additional legislation. In our experience, the more specific the legislation is to a sector / participant, the greater the inefficiency in its administration and the lower the net benefits to New Zealand consumers.
22	If you think that industry codes or rules could fill a gap, what class of matters or rules could be included in an industry code or rules?	See response to question 21 above.
23	If the Commerce Act is amended to provide for the making of industry codes or rules, what matters would be important to consider in the design of the empowering provisions in the Act?	See response to question 21 above.
Issue 9 – Modernising court injunction powers		
24	Should the injunctions powers in the Commerce Act be updated to allow the court to set performance requirements? Please provide reasons	In our experience, there has been no situation where a Court has not been able to grant the form of injunction that is necessary to do justice.
Issue 10 – Protecting confidential information		
25	Do you consider that the Commission effectively maintains the balance	No, it does not.

	between protecting commercially sensitive information and meeting its legal obligations, including the principle of public availability? Please provide reasons or examples.	In our experience, international clients familiar with competition regimes around the world regard New Zealand as the country that provides the lowest level of protection for confidential information amongst countries against which we would normally rank ourselves. The Commission itself recognises this. The primary effect of this is that it leads to (local and international) parties not making complaints about anticompetitive behaviour for fear that any confidential information they would like to provide to the Commission might become public. This materially hinders the Commission's enforcement program across all key sectors and leads to worse outcomes for New Zealand consumers. In merger control we have also seen it leading to New Zealand being excluded from an otherwise pro-competitive transaction, or (if local) the transaction not proceeding, or a preferred bidder (with an ability to generate synergies that would be passed on to consumers) being excluded from a process.
26	What additional regulatory changes may be desirable relating to commercially sensitive information? Please provide reasons.	In our view, the following reform would be essential to better facilitate enforcement by the Commission, and pro-competitive mergers being progressed: - The Commission should provide a blanket protection of confidentiality to complainants in a behavioural investigation process. - The Commission should be permitted and encouraged not to publish applications for merger clearance, but to limit publication to the Statement of Preliminary Issues summary. - Information provided (voluntarily or in response to a compulsory order) by third parties in both merger and investigation process should be confidential by default. - The Commission should provide a summary of complaints if it (a) advances from screening inquiry to opening an investigation; (b) is considering taking Court action; (c) at each stage in a merger control process, in a separate document disclosed only to applicant(s), that accompanies the Letter of Issues and Letter of Unresolved Issues phases of that process. - The Commerce Act should be reformed to provide for the role of a Hearing Officer, as outlined in our covering letter, such that if any party engaging with the Commission is concerned that the disclosure provided does not meet the requirements of natural justice, that question can be quickly determined by an expert, independent party.
27	What are your views on strengthening the confidentiality order provisions in s 100 of the Act?	In our experience, it is the Official Information Act 1982, combined with the practice of the Commission, and what we understand may be a reluctance on the part of the Ombudsman to permit the Commission to issue binding guidelines, which has generated the current settings.

		It is in our view an anomaly to treat commercial information provided to a regulator to allow the regulator to screen those commercial dealings for harm to consumers, as having the same public interest and subject to the same disclosure tests as information created by government agencies in the performance of public interest functions (ie work that is funded by the taxpayer). Under the Commerce Act, the work undertaken by the Commission (funded by the taxpayer and regulated industries) is practically subject to absolute protection from disclosure. The Commission's work is privileged and not amenable to disclosure unless bad faith or gross negligence can be demonstrated (s106). Yet commercial information provided to the Commission is routinely disclosed, either by publishing of submissions or through practices developed over time to provide third party information to applicants or parties under investigation, on a counsel only basis. In our view, if there is a desire to ensure more effective competition law enforcement, then a greater presumption of confidentiality must apply to information provided to the Commission. We have suggested the creation of a Hearing Officer role, as an independent, legally qualified person, to ensure that this change does not undermine natural justice rights of parties under investigation, or applicants in Commission merger control processes.
Issue 11 – Minor and technical amendments to Commerce Act		
28	What are your views on these proposed technical amendments to the Commerce Act?	We support the minor and technical amendments proposed in the discussion paper, with the exception of the proposal to specify a time period for which a collaborative activity clearance is valid. Many collaborative activities are perpetual in nature or have an open-ended time frame. It would introduce unnecessary uncertainty for a collaborative activity to have a Commission-imposed end date upon which the parties would need to reconsider continuing their collaboration. Similarly, if the parties planned to collaborative for a fixed term (say 5 years), it would be unduly disruptive for the Commission to grant a clearance for a reduced time (say 2 years).
29	Are there any other minor or technical changes you consider could be made to improve the functioning of New Zealand's competition law?	See Appendix 1.
Any other issues		
30	Are there any other issues that you would like to raise?	See Joint Submission for discussion of a de minimis threshold. We also consider that the creation of a role of Hearing Officer, as outlined in our cover letter and further discussed in this submission at paragraph 27, together with the other changes outlined in that paragraph, would materially enhance the effectiveness of the Commission to encourage and adjudicate competition law breaches, to facilitate competition in markets in New Zealand. See also Appendix 1.

Appendix 1 – Other amendments

Issue 11 – Minor and technical amendments to Commerce Act		
S 2(9)	Disassociation from Trade Association resolution	Recommend: "he" be changed to more gender-neutral language.
S 5	Application of the Act to the Crown	In our experience, a number of concerns have arisen over time in relation to conduct by Crown entities acting in trade, including in competition with private businesses. Material consumer harm can arise, particularly given the significance of many of those commercial activities to the wider economy. We understand providing that the Crown agencies are not amenable to civil penalties. However, we do not agree there is a sound justification for deterring the Commission from taking action against Crown actors in trade that may be in breach of the Commerce Act, immunising Crown employees and agents acting in trade from criminal prosecution (and from civil penalties) if they engage in cartel conduct or other restrictive trade practices. We query whether this is consistent with New Zealand's commitments under New Zealand's adoption of the OECD Recommendation of the Council on Competitive Neutrality, obligation II (1)(b), to "Maintain Competitive Neutrality in the enforcement of competition [ ] law": (here) We also query whether the obligation to support competitive neutrality "to the maximum extent practicable" is being met, given the lack of specific prohibition, or ability to take any enforcement action against, practices by Crown entities that are inconsistent with that OECD Recommendation. We recognise the (limited) reference to this obligation in a recent publication by the Commission (here) (para 27). However, this does not appear to have had any real impact. See the OECD Toolkit for examples of arrangements that would be inconsistent with the Recommendation: here. Recommend (1): If individuals acting on behalf of the Crown (where it acts in trade) engage in cartel conduct, or other restrictive trade practices, they should face the same consequences as private business actors in the same circumstances. The same restrictions on indemnities (s80A) and amenability to management banning orders should also apply. Recommend (2): Include in the Commerce Act a specific competitive neutrality prohibition that would allow the Commission or affected parties to seek a declaration if a Crown entity has or obtains undue advantages arising from a contract, arrangement or understanding or conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.
S 29	Contracts, arrangements and understandings containing	S 29 (repealed in 2017) created a presumption that arrangements between competitors that excluded another competitor were illegal unless the parties to the arrangement could prove that the exclusion did not substantially lessen competition.

	exclusionary provisions	Section 29 was a useful provision for small businesses that felt the effects of larger competitors/oligopolies that had arrangements or understandings that restricted the smaller competitor from accessing products, services or customers. The reason it was useful was that it reversed the onus of proof. Recommend: s 29 be reinstated.
S 31/32	Collaborative activities and vertical supply exemptions	Clarification is required as to the interaction between s31 and s32. The lack of clarity restricts the usefulness of the s32 exemption. Given in most situations there is some element of actual or potential competition between parties in a vertical supply arrangement, in almost every case, the (higher) collaborative activities threshold must be applied to provide clients with sufficient comfort of compliance. A recent example of this issue arising is in the Commission's investigation into the courier services market (2024). Recommend: Amendment of the collaborative activities exemption to exclude vertical supply arrangements. Amendment of the vertical supply exemption to apply to all arrangements where the dominant purpose of the arrangement is vertical supply, and any activity or potential activity in competition is no more than minor (or similar).
S 33	Joint buying and promotion	Joint buying and promotion exemption is limited in its application by the fact it is restricted to price fixing, not covering the other categories of cartel conduct. Recommend: the joint buying exemption apply to all cartel conduct where the criteria in that section are met.
S 37	Resale price maintenance	In our experience, RPM only harms competition if suppliers set prices where there is not sufficient downstream competition. The rules are cumbersome to comply with and often not followed in practice. Repealing this provision, to allow the general prohibition against arrangements that substantially lessen competition to apply in resale price maintenance situations would bring New Zealand in line with US case law development. Recommend: repeal s37.
S 44(1)(g)	Export-related provision exception	Section 44(1)(g) of the Act, which relates to export-related provisions, should be amended to remove the obligation to provide particulars of the provision to the Commission. This is very rarely used in practice, and there is no policy justification for requiring this notification. Recommend: delete the text after "wholly outside New Zealand".