New Zealand Law Society
Te Kāhui Ture o Aotearoa

Commerce (Commerce Commission Reform) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

28 April 2026

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Commerce (Commerce Commission Reform) Amendment Bill (**Bill**), which will amend the Commerce Act 1986, the Telecommunications Act 2001, and the Grocery Industry Competition Act 2023. It is intended to give effect to the Government's response to the independent review of the Commission's governance and effectiveness, led by Dame Paula Rebstock (the **Rebstock Review**).

1.2 This submission, prepared with input from the Law Society's Commercial and Business Law Committee and Public Law Committee,[1] discusses issues arising from:

(a) clause 5 of the Bill, which replaces Part 1 of the Commerce Act (**Act**); and

(b) Schedule 1 of the Bill, which inserts new Part 8 into Schedule 1AA of the Act.

1.3 The Law Society does not wish to be heard in relation to this submission but would be happy to appear before the Select Committee to answer any questions, if that would be helpful.

2 Commission's functions (new section 11 in clause 5)

2.1 New section 11 sets out the Commerce Commission's (**Commission**) functions. One of these functions is to "to issue warnings, reports, or guidelines, or make comment, about any matter relating to competition and consumer interests (whether generally or in relation to 1 or more particular persons)".[2] This broad function gives rise to several concerns, which we discuss below.

Function to issue warnings

2.2 The Bill introduces a new statutory function of the Commission to issue warnings about any matter relating to competition and consumer interests. However, the Bill does not identify:

(a) the purpose of a warning;

(b) what conduct would trigger the need to issue a warning;

(c) what work must precede the issuance of a warning (for example, whether the Commission would need to complete an investigation to determine whether a warning should be issued);

(d) how a warning should be issued (such as whether it may be public or private), and what matters the warning must convey; and

(e) whether any failure to heed a warning would result in consequences and, if so, the extent of any natural justice obligations.

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1 Information about these committees is available on the Law Society's website: www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/.

2 New section 11(1)(d).

2.3 We acknowledge that warning letters are one of five enforcement tools currently available to the Commission,[3] and this new subsection may be seeking to legislatively recognise that warnings form part of the Commission's enforcement functions and actions. If that is the intention, it may be more appropriate to include this particular function under new section 11(1)(e), which requires the Commission to "monitor compliance with, investigate conduct that constitutes or may constitute a contravention of, and enforce commerce legislation".

2.4 If that is not the intention, we recommend amending the Bill to specify the matters identified at [2.3] above. Given the issuance of warning letters is not currently a statutory function of the Commission, and was not a focus of the Rebstock Review, it would be helpful to specify these matters in the legislation to provide certainty in the Commission's functions.

Function to comment about "any matter relating to competition and consumer interests"

2.5 As currently drafted, new section 11(1)(d) suggests the Commission will be expected to comment on (among other things) laws, policies and policy settings relating to competition and consumer interests.

2.6 It is unclear what purpose this 'commenting' function is intended to serve, noting new section 11(1)(d) will also empower the Commission to issue guidance (and this will presumably include guidance on the interpretation and application of relevant laws and policies). The broad drafting of this provision creates ambiguity as to the scope of the Commission's statutory functions, and it is unclear what other matters the Commission would be expected to comment on in order to discharge this function.

2.7 We further note that the Commission is an independent regulatory and law enforcement entity, and a general function of 'commenting' on policy and legislation may create tension with this. The scope of this provision is more expansive than the current framework, and the Commission may be placed in the position of both commenting generally (and perhaps critically) on relevant legislation and policy settings, while also carrying out regulatory and enforcement functions in accordance with those settings. Operationally, this will require the Commission to be alive to the risks of pre-determination (perceived or actual) and bias.

2.8 We invite the Select Committee to seek advice from officials as to what activities are intended to fall within new section 11(1)(d), and whether this subsection could be refined to more clearly identify the Commission's functions. We note this is particularly important given the Rebstock Review recognised that a new legislative framework should include clear statements on the functions and powers of the Commission and guardrails for the Commission's use of its powers.[4]

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3 Commerce Commission *Enforcement Response Guidelines* (July 2024) at [6] and [23]-[36]

4 At page 49.

3 Composition of regulatory committees (new section 15(1)(d) in clause 5)

3.1 New section 15(1)(d) provides that regulatory committees could include, in addition to the individuals identified in subsections (a) to (c), "any other persons … that the board thinks fit". However, the Bill does not provide any further details on how these persons are appointed, or on what basis these appointments are to be made. This is in contrast to the provisions in the Bill which set out requirements for the appointment of commissioners:

(a) The Minister must be of the opinion that the person is qualified for appointment, having regard to the functions of the Commission, by virtue of that person's knowledge of or experience in industry, commerce, economics, law, finance, infrastructure, public administration, or consumer affairs.[5]

(b) The Minister must have had regard to any nominations for appointments that may have been provided by the board.[6]

(c) Sections 28(2) to (4) and 29 to 31 of the Crown Entities Act 2004 apply to the appointment process.[7]

3.2 Like commissioners, those who are appointed to a regulatory committee under new section 15(1)(d) will play a significant role in performing and exercising the functions, duties, and powers of the Commission under the proposed new legislative framework.[8] It would therefore be desirable to amend the Bill to clarify:

(a) the basis on which appointments should be made under new section 15(1)(d) (including whether, for example, appointees should have specific experience or expertise); and

(b) the process for making such appointments.

4 Voting rights of regulatory committees (new section 16 in clause 5)

4.1 The Bill provides for the appointment of regulatory committees to perform and exercise (under delegated authority) the Commission's functions, duties, and powers.[9] New section 16 provides that the charter for the operation of regulatory committees must set out a range of matters, including voting rights that provide for commissioners to hold a majority of voting rights.

4.2 It is unclear whether these 'majority' voting rights refer to:

(a) votes which carry more weight than a 'regular' vote, and if so, what extra weight they would carry (noting this would effectively mean only commissioners can vote on matters, which renders the appointment of other persons to the committee somewhat redundant); or

5 New section 20(2)(a) in clause 5.
6 New section 20(2)(b) in clause 5.
7 New section 20(3) in clause 5.
8 See, for example, new sections 14, 16 and 18 in clause 5.
9 New section 14 in clause 5.

(b) the commissioners together holding more than 50% of the voting rights, with these being equally divided by the number of commissioners (and we note this option appears to be more workable); or

(c) something else.

4.3 As a result, it is also unclear how this requirement would work in practice – for example, what would be the outcome where a regulatory committee is comprised of two commissioners and one other person, and the two commissioners disagree with each other, and the other person agrees with one of the commissioners?

4.4 We recommend amending the Bill to specify in more detail the operation of regulatory committees. This could include providing a definition of 'majority voting rights' to improve the clarity and workability of these provisions.

4.5 We also note the Bill does not account for circumstances where a regulatory committee comprises an even number of members (including two commissioners), and votes are equally split between each of the two commissioners and remaining members. The Select Committee could consider whether the Bill should require regulatory committees to be comprised of an odd number of members in order to avoid 'split' or 'hung' votes, or to give the Chair of a Committee a casting vote in these circumstances.

5 Scope of call in powers (new section 18 in clause 5)

5.1 New section 18 grants the board the power to call in a matter that is before the regulatory committee. Once a matter is 'called in', the regulatory committee would no longer be the decision-maker for that matter, and the board would be required to appoint a senior regulatory committee under the Crown Entities Act to decide the matter.[10]

5.2 This call in power could create a potential tension with the requirement in new section 17, which requires regulatory committees to be independent of the board, particularly in light of the broad nature of the call in power, which permits the board to call in a matter to ensure:[11]

(a) consistency in decision-making across the Commission (new section 18(1)(a)); and

(b) compliance with the Act, a charter, or "any applicable policies or procedures" (new section 18(1)(b)).

5.3 We recommend the Select Committee consider whether it would be desirable to narrow the scope of this power as proposed below.

Consistency in decision-making

5.4 If the objective of new section 18(1)(a) is to promote consistency in decision-making across the Commission, this could perhaps be better achieved by incorporating this

10 New section 18(2) of clause 5.
11 New section 18(1).

objective into the charter for the operation of regulatory committees,[12] rather than through the exercise of call in powers. Consistency in decision-making helps to promote the rule of law and this should, in our view, be a guiding principle for regulatory committees exercising and performing the Commission's functions and powers. This could then potentially reduce the need for the board to exercise call in powers to ensure consistency.

Applicable policies and procedures

5.5 The term "any applicable policies or procedures" is broad: it is unclear what comes within the scope of this term, and whether this is a reference to policies and procedures of the board and Commission, or policies or procedures more generally (which would include, for example, economic policies of the Government, which the Commission must have regard to).[13] The Bill could be amended to include a definition of this term (or alternatively, to provide some guidance as to what policies and procedures it refers to) – doing so would then limit the circumstances in which the board may exercise its call in powers.

Recommendations to call in a matter

5.6 An alternative option would be to amend the Bill to provide that, in order for the call in power to be exercised:

(a) the chairperson of the board or the chief commissioner must first recommend that it is necessary or desirable to call in a matter; and

(b) the board may then exercise the call in power, on the basis of specified grounds.

6 Economic policies of the Government (new section 26 in clause 5)

6.1 New section 26 in clause 5 appears to seek to formalise the Commission's current process of considering government policies (specifically relating to economic policy) when undertaking its functions. We consider the drafting of new section 26(1) should be revised. We also query whether the inclusion of this clause is intended to address recommendation 25 from the Rebstock review and, if so, whether this would be the most effective way to address the recommendation.

6.2 New section 26(1) states:

> In the performance and exercise of its functions, duties, and powers under this Act, the Commission *must have regard to* any economic policies of the Government that the Minister gives, in writing, to the Commission [emphasis added].

6.3 The phrasing "have regard to" also appears in the Crown Entities Act 2004 at section 105, where it sets out that a Minister does not have the power to order an independent Crown Entity, like the Commission, to have regard to or give effect to a government

12 New section 16 in clause 5, which provides that the charter must specify, among other things, the roles of the committee chair and the committee members, and meeting procedures.

13 New section 26 in clause 5. We also note here our comments regarding this clause in section 6 of this submission.

policy unless specifically provided in another Act. We note that new subsection 26(3) provides that new section 26 is not a direction for these purposes. That is appropriate. However, we consider that the wording of new section 26(1) could more clearly reflect that this is not a direction.[14]

6.4 The use of the phrase "must have regard to" is likely to cause uncertainty, despite subsection 26(3). The Commission may feel pressured to place more importance on governmental policy documents than it currently does, due to both the strength of the wording and this now being a legislative requirement (rather than a matter of practice). This would not be appropriate for an independent entity.

6.5 In our view, amending the phrase to be less mandatory (or to include a qualifier) may aid in ensuring that undue pressure is not placed on the Commission's decision-making process. The Law Society recommends amending the drafting of new section 26(1) to "should take into account to the extent appropriate in the circumstances" or "may be guided by" or similar, which denotes a lesser degree of requirement. This would more appropriately reflect the degree of influence government policy documents should have on the Commission's decision-making processes.

Jesse Savage
Vice-President

14 Though new section 26 is not a 'statement of principles' as such, it employs similar drafting in order to guide the Commission's process of consideration. The Legislation Guidelines note that some risk can arise from broad statements of principles, and suggests that the use of qualifiers can be beneficial. See Legislation Design and Advisory Guidelines < https://www.ldac.org.nz/guidelines/supplementary-materials/designing-purpose-provisions-and-statements-of-principle#statements-of-principle-9b9bab40 >