New Zealand Law Society
Te Kāhui Ture o Aotearoa

Commerce (Promoting Competition and Other Matters) Amendment Bill

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

4 February 2026

1 Introduction

1.1 The New Zealand Law Society Te Kāhui o Aotearoa (**the Law Society**) welcomes the opportunity to comment on the Commerce (Promoting Competition and Other Matters) Amendment Bill (**the Bill**), which proposes to amend the Commerce Act 1986 (**the Act**) to modernise and strengthen New Zealand's competition settings.

1.2 This submission has been prepared with the assistance of the Law Society's Commercial and Business Law Committee.[1]

1.3 The Law Society **wishes to be heard** on this submission.

2 General Comments

2.1 The Bill aims to give effect to decisions taken following a targeted review of the Act in early 2025, designed to identify issues with New Zealand's current competition settings. It aims to modernise and strengthen these settings by:

(a) Updating the merger control regime to:

a. Expand the substantial lessening of competition (**SLC**) test;

b. Introduce a new statutory notification regime; and

c. Give the Commerce Commission (**the Commission**) new powers and tools;

(b) Amending the cartel conduct process;

(c) Enhancing protections for confidential information; and

(d) Introducing a new test for predatory pricing.

2.2 The Law Society supports updating and modernising the Act to ensure it remains fit for purpose and achieves its objectives. However, it does have concerns about some of the amendments proposed by the Bill. This submission details these concerns and, where possible, makes recommendations to address them. These include:

(a) The necessity of expanding the substantial lessening of competition test.

(b) The need for and appropriateness of changes to the predatory pricing test.

(c) The potential for overreach with the Commission's new powers.

(d) The necessity of the new market study powers.

(e) The lack of clarity and drafting concerns in the proposed statutory notification regime.

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1 More information about the committees can be found on the Law Society's website: https://www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/

(f) The clarity of the drafting for the proposed restrictive trade practices amendments (insertion of corrective action orders).

(g) The proposed extension of the Commission's exemption from application of the Official Information Act 1982 (**the OIA**).

Alignment with Australian competition settings (and other equivalent jurisdictions)

2.3 The Law Society also supports greater alignment with Australian settings, unless there is good reason to diverge (for example, in the case of the SLC test and 'killer acquisitions', see below).

2.4 New Zealand is a small, remote jurisdiction with a low volume and value of potentially notifiable transactions as compared with the cost of litigation. Changes to our law that are not aligned with other equivalent jurisdictions worldwide, especially Australia, can create business and legal uncertainty. In a business context, uncertainty results in increased cost. Increased cost then translates to hesitation and significant caution when considering business decisions that could lead to capture, unintentional or not, under such a merger control regime. This could hinder investment, competition and innovation in New Zealand markets, in direct contradiction to the Bill's intention.

2.5 Legal uncertainty (especially where our legislative settings do not align with equivalent jurisdictions) can take a long time to be resolved, reliant as it is upon cases being brought in the New Zealand courts. Historically, such cases can take ten years or more to be determined at the senior court level (for example, the reform of the misuse of market power test). Alternatively, where New Zealand reform aligns with Australia, New Zealand can rely on Australian jurisprudence, which is typically resolved more quickly due to the greater volume of mergers and the higher value of transactions involved.

2.6 Implementing reform that is out of step with Australia may also have further practical implications for investigations and enforcement under section 36, misuse of market power in a trans-Tasman market.

2.7 This submission identifies at various points where greater alignment should be sought.

3 Mergers and acquisitions

3.1 New Zealand's merger control framework applies the *substantial lessening of competition* test (**the SLC test**) as the central criterion for the Commission's practical, risk-based assessment of proposed transactions. The SLC test provides the basis for determining whether a transaction is likely to result in a substantial lessening of competition in the relevant New Zealand markets.

3.2 A robust assessment under the SLC test is essential to protecting the long-term interests of consumers and the wider market. Effective competition is a key driver of efficient pricing, quality, and innovation. Conversely, any material reduction or removal of competitive restraints can lead to higher prices, diminished quality or output, and wider adverse impacts for New Zealand's economic performance. Ensuring mergers do not undermine competitive market structures is therefore critical to safeguarding these public benefits.

3.3 We note that the Commission is clear that if there is doubt (during the assessment process) as to whether a proposed merger will lessen competition, the Commission will err on the side of caution and decline the clearance required to proceed with the merger.[2]

3.4 It is also essential for a well-functioning competitive market that firms have adequate certainty about likely merger outcomes. Predictability in the operation of the merger regime can support innovation, productive collaboration, and overall business confidence. Conversely, a market characterised by low regulatory certainty can result in reduced investment, delayed or foregone efficiency-enhancing initiatives, and weakened incentives for firms to innovate or enter new markets. Over time, this uncertainty can diminish competitive pressure and ultimately harm consumers through poorer outcomes in productivity, price, quality and choice.

3.5 The RIS states that the current merger regime lacks the necessary clarity, scope and tools to prevent anti-competitive consolidation in New Zealand.[3] The Law Society agrees in part; however, we have identified some concerns with the amendments proposed in the Bill. These are detailed below.

Clause 5 – Certain terms defined in relation to competition

'Killer' acquisitions

3.6 Clause 5(1) proposes to expand the SLC test to include 'creating, strengthening, or entrenching a substantial degree of power in the market'.

3.7 The Law Society considers clause 5(1) does not achieve an appropriate balance between effectively restricting anti-competitive conduct and providing the regulatory certainty needed to support innovation, encourage collaboration, and sustain the business confidence necessary for a well-functioning competitive market.

3.8 It is clear this amendment aims to capture 'killer' acquisitions (acquisitions that 'kill' potential market competition), and to clarify that small increases in market power can result in a substantial lessening of competition where dominant players are concerned.[4] However, the Law Society considers that the proposed amendment is not necessary because:

(a) The Commission is not precluded from blocking the acquisition of small, nascent competitors under the current SLC test and has done so;[5]

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2 Commerce Commission *Mergers and acquisitions Guidelines* (May 2022) at 2.34.

3 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Targeted Review of the Commerce Act 1986* (14 August 2025), at [96].

4 Explanatory note.

5 Ministry of Business, Innovation and Employment "Promoting competition in New Zealand – A targeted review of the Commerce Act 1986" (December 2024) at 11 – 12 concedes this is the case and provides examples; Commerce Commission New Zealand "Statement of Unresolved Issues – Trade Me Limited/PropertyNZ Limited" (30 June 2021) at 9.2 further makes it clear that the Commission would not have felt inhibited from blocking the acquisition of small, nascent competitors using the current SLC test.

(b) It risks unintentionally capturing competitively benign, or pro-competitive conduct (by expanding the test too widely);

(c) It does not align with Australia (who apply it only to mergers) or other equivalent jurisdictions;

(d) The proposed amendments to section 3(8) would cover the 'killer' acquisition and creeping acquisition concerns alone;

(e) It risks moving the focus of the test from effects on competition towards examinations of market structure; and

(f) The proposed change creates more uncertainty, not less.

3.9 We acknowledge that Australia has introduced this change to the wording of the SLC test, however this is only in respect of merger control. Generally, we agree that alignment with Australia should be sought unless there are good reasons not to, and throughout this submission we note areas where greater alignment with Australia is desirable. However, in the case of merger controls, we consider that there are good reasons to diverge from the Australian model, both for the reasons set out above and because evidence of a problem to be solved within New Zealand is weak.

3.10 The Law Society recommends that clause 5(1) be deleted. If it is not deleted, we recommend the amendment be narrowed so that, like Australia, it applies only in relation to mergers.

Creeping acquisitions

3.11 Clause 5(2) inserts three proposed new subsections with the combined intent of capturing creeping acquisitions that are likely to have an overall effect of substantially lessening competition in a market. While the Law Society generally supports the capture of creeping acquisitions, we have some concerns about the practical effect and extent of the amendment proposed by clause 5(2).

3.12 We understand similar provisions have been implemented in Australia. However, proposed new section 3(8) goes further than the Australian equivalent by allowing the Commission to aggregate the impact of *any* acquisitions in the previous three years, not just those involving the same or substitutable products and services. In our view, this goes beyond the stated problem definition of a substantial aggregation of market share over time.

3.13 Further, the aggregation of the impact of mergers over the course of multiple years does not easily lend itself to the orthodox, well-known and understood counterfactual analysis. The counterfactual analysis compares the likely states of competition with and without an acquisition to isolate the likely competitive effect of that acquisition. Assessing multiple acquisitions as one, as this change would require, is likely to be time-consuming and difficult (untangling and aggregating the merger effects of multiple acquisitions).

3.14 We note that the new Merger Assessment Guidelines produced by the Australian Competition and Consumer Commission (**ACCC**) provide scant guidance on how it will conduct the analysis, which perhaps indicates that it is not straightforward (and gives

rise to uncertainty).[6] Adopting a broader provision than Australia will only increase the uncertainty for the business community and their advisors in both New Zealand and Australia.

3.15 Clearance applicants will presumably be required to provide information about previous acquisitions in merger application forms. For larger international firms that regularly acquire other entities, working through all acquisitions in the past three years with a potential New Zealand nexus may be a lengthy exercise. This amendment has the potential to increase the regulatory burden substantially and significantly slow the merger clearance process.

3.16 Lastly, the Legislation Design and Advisory Committee Guidance provides that legislation should not have a retrospective effect.[7] We consider that the transitional provisions of the Bill should comply with this by stipulating that new section 3(8) will not come into effect until three years past the commencement of the Bill so that parties involved in acquisitions can be aware of the effects of this provision and take them into account when making their decisions about acquisitions over the next three years.

Clauses 23 and 24 – Clearance and authorisations for business acquisitions

Statutory timeframe

3.17 Clauses 23 and 24 amend the statutory timeframe for the Commission's determination at section 66(3A) and section 67(3) from 'such longer period as the Commission and the person who gave the notice agree' to beyond 140 and 160 working days (respectively), by 20 additional working days at a time if more time is needed.

3.18 We consider that, as the timeframe for determination under these sections is set by agreement, the addition of subsections (a) to (d) is unnecessary and introduces avoidable complexity. We recommend deleting subsections (a) to (d) from clauses 23 and 24. If they are retained, we recommend amending subsection (a) in both clauses to refer to the complexity of the analysis required, in addition to the complexity of the acquisition itself.

Clauses 27 and 28 – Undertakings

3.19 Clause 27 will amend section 69A(1) and (2) to enable the Commission to accept a behavioural undertaking where divestment is insufficient to enable the clearance for an acquisition under sections 66 and 67.

3.20 We note that in Australia (and other major comparator jurisdictions), the behavioural undertakings regime can also be used to address or prevent concerning conduct that harms competition.[8] Where one of the Bill's objectives is to ensure the New Zealand regime is aligned with international partners,[9] the Bill's restriction on the use of undertakings appears counterproductive. Drafting new section 69A(1) and (2) in this

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6 Australian Competition and Consumer Commission *Merger Assessment Guidelines* (June 2025) at 1.31.

7 Legislation Design and Advisory Committee *Legislation Guidelines 2021* at Chapter 12.

8 Australian Competition and Consumer Commission *Guidelines on ACCC approach to court-enforceable undertakings* (September 2024) at 2 – 3.

9 Above, n 3, pp 3, 11 - 14.

way also limits flexibility, as any future adjustments would require legislative amendment.

3.21 The Law Society recommends that the Select Committee consider taking advice on this issue.

3.22 Clause 28 then amends section 69AB to set out the circumstances in which certain conduct does not constitute contravention of an undertaking. New section 69AB(1A)(b) will require, as a part of this, that the person has notified the Commission 'as soon as' they became aware of the breach. We consider this may be interpreted as imposing a standard that is measurably too strict, and capture circumstances where the person becomes aware of the conduct that constitutes the breach, but it is not immediately clear to the person that it constitutes a breach. This is particularly likely given that the breach must be minor or technical. It is not clear whether the provision would be interpreted so that awareness relates to the point at which it was understood to be a breach, rather than awareness of the breach conduct.

3.23 The Law Society recommends that the wording of new subsection 69AB(1A)(b) be adjusted to acknowledge this complexity by changing 'as soon as' to 'within five working days of the person becoming aware of the material facts giving rise to the breach' or similar.

Clause 41 – Determination of appeals

3.24 Clause 41 will insert new subsection 93(2),[10] to provide that a court may not modify or reverse a determination by reason only of the Commission's decision not to accept an undertaking. It also clarifies that a court does not have the power to accept a behavioural undertaking.

3.25 It is not clear why it is proposed that the court would not have this power. In our view, any restriction on the court's powers should be justified by a compelling rationale. No such justification appears to exist in this instance. The proposed limitation risks undermining a person's access to justice and an effective right of review.

3.26 We recommend the Select Committee seek advice from officials on this issue and consider amending the clause to provide the court with the power to accept a behavioural undertaking where it is the sole reason for the Commission's decision not to grant an acquisition.

3.27 However, if the policy decision is that a clearance or authorisation cannot be disturbed solely on the basis of whether an undertaking was accepted, then we query whether section 94 should be made subject to section 93(2)(a).

4 Predatory pricing

4.1 Clause 6 inserts proposed new section 36C, which introduces a new test for predatory pricing, with the intention of improving clarity about when below-cost pricing is likely to

10 Note that section 93 does not currently have a subsection (1), and query whether this is a minor drafting error that needs to be rectified.

breach the Act. This proposed amendment was announced in September 2025 and did not feature in the targeted review of the Act.

4.2 At the outset, we observe that in practice, there is little evidence of a problem with predatory pricing and its enforcement in New Zealand. By contrast, the current economic climate has seen multiple investigations and reports concerning pricing that is too high rather than low-cost predatory pricing.[11] In this context, introducing a new and uncertain element to tackle predatory pricing is unlikely to benefit consumers. Its most probable effect may be higher prices, as businesses may err on the side of caution to avoid inadvertently breaching a new and uncertain test.

4.3 We further note that even if a firm with a substantial degree of market power makes itself comfortable that it complies with proposed section 36C, it would still be subject to section 36 and other parts in Part 2 of the Act. As a result, proposed section 36C risks detracting from what should be the proper focus of large firms (i.e. whether its conduct is likely to result in an SLC). It adds unnecessary regulatory burden and risks giving large firms false hope that pricing above cost means they are immune from breaching the Act.

4.4 In our view, predatory pricing is already adequately addressed under existing section 36. Introducing a new test that incorporates concepts unique to New Zealand, without clear definitions, will create unnecessary uncertainty. It is unclear how these new terms would be interpreted in practice. For example, we query:

(a) What would constitute a 'sustained period' of below-cost pricing?

(b) What is the time period over which the 'average' is calculated in each one of the cost tests?

(c) What constitutes 'long-run' in Long-Run Average Incremental Cost?

(d) Does Average Total Cost intend to apply all of a business's costs to the product in question?

(e) What period would be used to calculate the averages (over the period that the product is on sale for under the Average Cost or over the accounting year in which the conduct occurred)?

(f) Would costs be allocated to the product using accepted accounting practices, or refer to some more detailed guidance?

4.5 Lastly, the current form of the section 36 test is less than three years old itself and has not had the time to be tested in the courts. We consider such a change to the test at this point to be premature.

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11 The Commerce Commission's own Retail Groceries Market Study in 2022 identified that there were concerns about pricing behaviour that was not related to predatory pricing. We also note that the Australian Competition and Consumer Commission is moving to introduce a ban on price gouging in its supermarket industry, and New Zealand's industry faces similar issues. Additionally, the Commission noted concerns in 2024 about issues with pricing in the airline industry, where concerns were about prices being too high and dynamic pricing practices. Lastly, the Commission currently has a case before the courts alleging that Winstone Wallboards used retroactive rebates for an anticompetitive purpose – this suggests that the current law is not a barrier to litigation, as suggested in the RIS at p 68 - 69.

4.6 The Law Society recommends clause 6 be deleted. If clause 6 is retained, we recommend the Select Committee seek advice on the issues raised at 4.4, including whether the Commission should be directed to issue detailed guidance on how the provision will be interpreted and how it will be enforced.

5 Call-in and stay powers

5.1 The Bill provides the Commission with additional powers and tools for the investigation and enforcement of anti-competitive conduct. Clause 10 sets out these new powers. We note that some of the potential effects of mergers in newer digital markets may not be immediately clear. Under current settings, this would make it difficult for the Commission to prove a substantial lessening of competition is likely to occur. As a result, the Law Society agrees that it is reasonable to provide the Commission with an expanded set of regulatory tools to address challenges posed by mergers in new and digital markets. However, the Law Society has some concerns about the extent and drafting of the proposed additional powers granted to the Commission.

New section 47E(4)

5.2 New section 47E(4) provides that the Commission may specify steps that must be taken to safeguard assets. This introduces a risk that a person takes those steps, but they turn out to be insufficient to protect the assets. Where this occurs, a person who takes the steps directed by the Commission should not be exposed to any action arising from those steps and should be deemed to have fulfilled their obligation to safeguard the assets.

5.3 The Law Society recommends that a new subsection be inserted to explicitly state that the person who fulfils those obligations is immune from action for taking those steps, where they are ultimately insufficient to protect the assets.

New section 47E(5)

5.4 New section 47E(5) provides that the Commission would only be able to issue a suspension order in relation to a proposed acquisition under section 47E if it has reasonable grounds to believe it is necessary to protect competition. At the same time, the Commission is required to assess whether the acquisition 'has the potential' to substantially lessen competition (i.e. breach section 47).

5.5 The Law Society is concerned that the phrase 'has the potential' in the proposed new section 47E(5) sets a low threshold for exercising the power and creates unnecessary uncertainty about when the power may be used. On the face of it, many acquisitions could 'have the potential to' substantially lessen competition, depending on the circumstances. The wording also introduces three separate threshold concepts within a single test – reasonable grounds to believe, necessity, and has the potential to substantially lessen competition.

5.6 While we agree there should be reasonable grounds to believe the power is necessary to protect competition, we recommend amending the provisions to remove 'has the potential to' and replace it with 'may result in, or has resulted in, a breach of section 47.'

New section 47F(1)(b)

5.7 New section 47F(1) sets out the threshold required for the exercise of the Commission's power to require clearance of an acquisition. Subsection (b) uses similar wording to new section 47E(5), and as such, we raise the same concerns. Use of the phrase 'has the potential to' introduces significant uncertainty and provides too low a bar for exercise of the power in this context. We recommend that this phrase be amended to 'may' as well.

6 Pro-competition regulation

6.1 Clause 12 inserts new section 51F, which allows the Commission to undertake a study for the purpose of making recommendations to develop regulations that support or promote competition.

6.2 The Act already allows the Commission to undertake market studies where it is in the public interest, and to make recommendations to improve competition at the conclusion of these studies. The current section 51A competition study powers are broad in scope and contain compulsory information-gathering mechanisms, supported by appropriate safeguards such as the requirement for clear terms of reference. If the intention is to enable a faster or more targeted study, section 51A is already sufficient to achieve that purpose, even though market studies to date have been resource-intensive and lengthy processes.[12]

6.3 The Law Society considers clause 12 to be unnecessary. It also lacks the safeguards included in the current section 51A. We therefore recommend deleting clause 12 and instead inserting an amendment to section 51B(3) to enable recommendations for the development of pro-competition regulation be captured there. This approach would achieve the same purpose as clause 12, while avoiding the need for additional sections and ensuring stronger, more consistent safeguards. We further note that, in our view, even the amendment to section 51B(3) would not be necessary, given that similar recommendations have already been made in previous market studies using the current provisions.

7 Statutory notification regime

7.1 The proposed statutory notification regime aims to better support beneficial collaboration between businesses. The explanatory note states that this will initially be limited to resale price maintenance and small business collective bargaining. However, the Bill contains provisions enabling the Minister to make recommendations about additions or amendments to the conduct that can be added to the statutory notification regime.

7.2 Clause 22 inserts new sections 65E to 65S. The Law Society is generally supportive of the proposed regime and comments below only on drafting issues that we suggest should be amended before the Bill proceeds.

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12 The Commission has thus far carried out market studies into high profile and complex industries: fuel, supermarkets, retail banking and residential building supplies. Each has taken approximately 12 months. More targeted studies, or studies into lower profile or less complex industries do not necessarily need to be as lengthy.

New section 65H(2)

7.3 The Law Society considers that this section would benefit from additional safeguards to clarify both its intended purpose and the circumstances in which it should not be used. We are also concerned that the current wording lacks the clarity required to provide the Minister with sufficient certainty when undertaking the proposed analysis for adding different types of conduct. This uncertainty is also likely to affect business confidence, as stakeholders may be reluctant to collaborate if the conditions for adding new conduct types are unclear.

7.4 The Law Society's overall view is that the section is broadly framed and lacks specificity. For example, the term 'typical market conditions' is not defined, making its meaning ambiguous and potentially difficult to apply in practice. The Law Society recommends the legislation include a clear definition for this term and that the Select Committee consider seeking officials' advice about the drafting of this section and how to narrow the scope, and increase the clarity and certainty.

New section 65R

7.5 The Law Society notes that a drafting error means that subsection 65R(4) only refers to Part 2 of the Act, whilst subsection 65R(1) refers to both Part 2 and Part 3. We query whether new section 65R(4) should be amended to read 'the provisions of Part 2 *or Part 3* specified in the exemption…' (emphasis added).

8 Restrictive trade practices

8.1 Clause 32 inserts new section 82F, which sets out the corrective action order process where there has been a contravention of Part 2, restrictive trade practices. The Law Society has some concerns about the drafting of the proposed section. There are aspects of the order process that remain unclear and unrestrained in new section 82F. These give rise to perpetual regulation concerns, and concerns about the lack of appropriate safeguards on the power to make an order.

8.2 First, turning to the perpetual regulation concerns, the Law Society considers it is inappropriate for the provision not to include an explicit review period on a corrective action order, given subsection 82F(4)(a) may inadvertently allow for the creation of perpetual regulation of a single entity.[13]

8.3 Second, we query whether amendment should be made to section 88 of the Act, to explicitly provide that section 82F injunctions require proof that the conduct has already occurred. In our view, it should also be made explicit whether the court needs to consider if there is proof that the person intends to engage again, or whether there is imminent danger of substantial damage (as per section 88(2) and (3)).

9 Confidential information – clauses 52 and 53

9.1 The Law Society notes the significance of these provisions, which include changes that significantly restrict the operation of the OIA. Our primary concerns here relate to

13 *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* HC Wellington CP270/89, 23 November 1989 at 87 – 89.

proposed section 100AA(3), though we also make recommendations to moderate the proposed amendments to section 100.

9.2 The Bill makes several changes to section 100 of the Act, to considerably broaden the application of that section. It also introduces new section 100AA, subsection (3) of which means that any request for information under the OIA must meet one of the grounds for publishing information in subclause (2) in order for the requested information to be provided. This is effectively a significant expansion of the grounds that the Commission can use to withhold requested information. Most requests will likely have to come within subclause (2)(c) (disclosure for the purposes of, or in connection with, the performance or exercise of any function or power conferred or imposed on the Commission by the Act or any other legislation) or subclause (2)(e) (disclosure is to a person who the Commission is satisfied has a proper interest in receiving the information). Both of these tests could be difficult for many requesters to meet.

9.3 The OIA is a constitutional statute that has as its aim the progressive availability of official information, to enable participation in government and promote the accountability of Ministers and officials. It is intended to operate as a comprehensive harm-based scheme, capable of protecting specified interests unless the countervailing public interest in disclosure outweighs that prospective harm.[14] It does not take a class-based approach to the protection of official information.[15]

9.4 Statutory exemptions from the OIA should only be enacted for compelling reasons and after careful consideration.[16] As stated in the Legislation Guidelines issued by the Legislation Design Advisory Committee:[17]

> *All public bodies should be subject to the Ombudsmen Act 1975, the Public Audit Act 2001, the Public Records Act 2005, and the Official Information Act 1982 (or the Local Government Official Information and Meetings Act 1987).*
>
> *The Acts… are key mechanisms by which government bodies are held accountable for their activities.*

9.5 As discussed further below, compelling reason is not evident in the case of proposed new section 100AA(3), nor the changes to section 100. There are existing withholding grounds under the OIA that can apply to this information and enable it to be withheld in appropriate cases. For example, if the concern is to maintain the commercial interests of the person the information relates to or who provided it, section 9(2)(b)(ii) is relevant. If the concern is to protect information provided in confidence, section 9(2)(ba) may apply. Although these withholding grounds are subject to the public interest test in section 9,

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14 Noting for completeness that section 6 withholding grounds are not subject to the countervailing public interest test.

15 See Te Aka Matua o te Ture | Law Commission *The Public's Right to Know: Review of the Official Information Legislation* (NZLC R125, 2012) at 2.4-2.7.

16 As the Ministry of Justice has identified, there is inadequate scrutiny of legislative clauses that override the disclosure requirements of the OIA, and it is not currently known how many of these clauses exist. Targeted engagement on this topic was undertaken by the Ministry in March 2024. The Law Society's feedback is available on its website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/law-reform-submissions/discussion-papers/.

17 Above, n 7, at 20.5.

release would only be required where, in the circumstances of a particular request, there are countervailing public interest considerations favouring disclosure (or partial disclosure), which outweigh the need to withhold the information.[18] The retention of this public interest override does not appear to be unreasonable, given the broad role of the Commission and the need for transparency and accountability.

9.6 The use of provisions such as these undermines the constitutional status and legislative scheme of the OIA. Where such provisions are proposed, they ought to be supported by clear evidence that it is necessary, and must be reasonable in scope. In this instance, it is not clear what specific and actual harm the provisions seek to guard against, nor whether those harms are not sufficiently protected by the OIA. If such analysis has been undertaken, it ought to have been made publicly available. Rather, the RIS focuses primarily on concerns such as:[19]

> *Submissions and Commission advice has highlighted that the current application of the OIA is creating significant reluctance among businesses and individuals to provide sensitive or commercially confidential information to the Commission, due to fears that it may be disclosed. Businesses are concerned that commercially sensitive material could be accessed by competitors, while whistleblowers and complainants are concerned about the risk retaliation if their identity is disclosed.*

9.7 It is not clear if any of these feared harms have in fact eventuated, and whether there have been cases in which information has been released under the OIA despite the likelihood of prejudicing a protected interest. Statistics from the Office of the Ombudsman indicate that any such issue must rest with the Commission: of the OIA complaints completed by the Ombudsman between 1 July 2023 and 30 June 2025, only one complaint resulted in a finding that the OIA refusal was not justified. This was a case of a company seeking information about *itself* from the Commission.

9.8 The issues described in the RIS appear not to indicate an issue with the adequacy of the protections available under the OIA, but rather the Commission's administrative processes and understanding (or confidence) in explaining how the OIA operates. This is highlighted by the statement in the RIS that '[m]any businesses highlighted that the Commission's limited discretion under the OIA has reduced trust and deterred third parties…',[20] and references to the Commission's processing of requests.[21] Although it is correct that OIA requests are time-bound and blanket withholding is not permissible, the OIA allows for the extension of that time frame in certain circumstances, and the procedural manner in which the Commission chooses to process requests is not controlled by the OIA. Delay and 'churn' can often be the result of process that is imposed by the agency, and not the OIA.

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18 There are also conclusive reasons for withholding information (section 6 of the OIA), such as where releasing information could prejudice the security or defence of New Zealand. These conclusive reasons are not subject to the public interest test. It is possible that they could apply in some instances.

19 Above, n 3, at [71].

20 Above, n 3, at [76].

21 Above, n 3, at [77].

9.9 To that end, the nub of the issue appears to be the Commission's preference to avoid the obligations that come with being subject to the OIA. The RIS states:[22]

> *Once an OIA request is received, the Commission assesses whether the information can be withheld. This often involves a line-by-line analysis of documents, consultation with the original information provider, and legal assessment of the public interest in disclosure. This process applies even where the information is plainly sensitive, and the investigation is ongoing. The balancing test is time-consuming, legally uncertain and exposes the Commission to risk of error delay.*

9.10 The Law Society is of the view that administrative convenience is not an appropriate basis on which to premise an exception to the OIA as extensive as proposed new section 100AA. Acknowledging again that there can be legitimate reason to limit the application of the OIA to certain information, we have concerns about the breadth of the proposed amendments and the power afforded to the Commission.

Clause 52 – section 100 amended

9.11 Clause 52 proposes to amend existing section 100 of the Act, broadening it to:

(a) Allow the order to be made in respect of any class of information, document, or evidence.

(b) Enable an order to be made whether or not the information, document, or evidence is in the Commission's possession.

(c) Extend the maximum period of prohibition on publication or communication from 20 working days after the final determination (or withdrawal) of an application or notice under Part 5 or the conclusions of any other investigation or inquiry, to 10 years after either event.

(d) Make the subsequent availability of the information under the OIA subject to new section 100AA.

(e) Significantly increase the penalty associated with infringement of the strict liability offence in subclause (6).

9.12 This is a power that is exercised without an oversight or appeal mechanism,[23] and the proposed extension of what is effectively an absolute discretion requires careful consideration. As drafted, the amended provision contains little to restrain or guide the Commission's exercise of the power. In particular:

(a) There is no clear justification for extending the period for which orders apply to a maximum period of 10 years. These changes are likely to significantly expand the use of section 100 orders. This could lead to the blanket exclusion of the OIA in many more cases than at present and for a much longer time. It is unclear why the existing length of the order (current section 100(2)) is inadequate and how

22 Above, n 3, at [77].

23 We acknowledge here that, notwithstanding the exclusion of the OIA's jurisdiction (at least until the order expires), the Ombudsman Act 1975 (OA) would apply to a decision by the Commission to issue an order.

10 years has been identified as the appropriate length of time. There may be good reason to extend this period, but it is not clear on the information provided. If there is good reason, this needs to be considered against the same factors as discussed above, and there needs to be a rational connection between this reason and the proposed extended period.

(b) There is no obligation on the Commission to impose the order for only a reasonable period or for the minimum period necessary, nor to apply it only to information that requires protection or is associated in some respect with the application or notification at issue (rather, it need only have been *obtained* in a specified context). The drafting of present section 100(2) draws a link between the effective conduct of the Commission's functions and the need to, at times, control the availability of information in that context. The manner in which new section 100 is drafted leaves the provision absent such a connection.

(c) There is no requirement for the Commission to have regard to any relevant considerations, such as open justice and public interest. See, for example, section 15(1)(2)(a) of the Inquiries Act 2013, which imposes more substantive considerations where an inquiry is considering making an order.

(d) Reference to the Commission not needing to be in possession of the information it seeks to control raises questions about whether this is intended to enable the Commission to make orders controlling the use of information held by other agencies and individuals not party to the Commission's investigation or inquiry (and perhaps even belonging to those other parties).

(e) Reference to a 'class' of information, as well as information not held by the Commission, would enable an order to be made without the Commission having reviewed the information and made an active decision about whether it is necessary and appropriate to include it within the scope of an order.

9.13 We note that inclusion of the terms 'without reasonable excuse' in the offence provision is an improvement on the present drafting.

9.14 The Law Society expects that the power in section 100 is likely to be used more frequently with the proposed changes. Given that, it recommends the Select Committee consider including appropriate safeguards on the use of section 100 orders in the future. This could include:

(a) A requirement that the order is made for a reasonable period, or the minimum period required to achieve a specified purpose.

(b) Specifying the purpose(s) for which section 100 orders are to be applied.

(c) Setting out what matters the Commission needs to consider before making an order under section 100, which we suggest should include a requirement for the Commission to consider factors such as whether release of the information will cause some irreparable harm, open justice, and public accountability, trust and confidence, before making an order.

(d) Clarifying whether the Commission can amend an order that has been made to, for example, reduce the period of confidentiality or amend conditions.

Clause 53 – new section 100AA

9.15 Clause 53 proposes to insert new section 100AA into the Act, including new section 100AA(3), creating a broad exception from the OIA, for *all* information provided to the Commission in confidence under the Act or any other legislation. Unlike section 100, this exception:

(a) Does not require that an order is made by the Commission. It is a blanket exemption covering a class of information, without requiring any assessment of the actual nature of the information and the potential impact of release or the length of time for which protection is reasonably required. Whereas amended section 100 provides the Commission with a very broad discretion, new section 100AA applies broadly but without allowing the Commission to modify its effect.

(b) It is not restricted to specific functions of the Commission under the Act or any other legislation (for example, mergers and acquisitions, and investigations).

(c) It applies further to information merely derived from the documents and information provided.

(d) Applies for a *minimum* of 10 years, with an ability for the Commission to extend this if, after consulting the person who provided the information, the Commission is satisfied that disclosure of the information may cause harm to that person or any person who is the subject of the information. The Commission cannot reduce the period of confidentiality. The only restriction on an extended period of confidentiality is that the Commission must not extend the period beyond the date on which the information is required to be transferred to Archives New Zealand under the Public Records Act 2005.

9.16 We also note the primary trigger for the application of proposed section 100AA is if the information is provided "in confidence". For this type of information, section 100AA effectively overrides existing OIA provisions (for example s 9(2)(b) and (ba)) which require balancing of commercial considerations with the public interest in disclosure. Under section 100AA information provided "in confidence" is given significant protection from disclosure.

9.17 Accordingly, there is a risk that those that engage with the Commission will provide information to the Commission with the label "in confidence" in order to obtain the considerable protection against disclosure of information that proposed section 100AA affords in circumstances where the information is not the type of information which should be protected from disclosure. If proposed section 100AA was to be retained The Committee may wish to consider whether the "in confidence" trigger is appropriate.

9.18 The RIS is not particularly specific in its separate analysis of sections 100 and 100AA and the analysis of proposed section 100AA is inadequate and at times conflated with the amendments to section 100. The DDS, states:

> *Following feedback from the Ministry of Justice on the proposed OIA exemption, the provisions were restructured to more closely align with the legislative frameworks in the Financial Markets Authority Act and the Reserve Bank of New Zealand Act. This alignment introduces clear statutory grounds for disclosure, making the regime more transparent, proportionate, and consistent with comparable protections.*

9.19 This is somewhat misleading. Parts of new section 100AA reflect section 269 of the Reserve Bank of New Zealand Act 2021 (**RBNZ Act**), which itself largely mirrors section 105 of the Banking (Prudential Supervision) Act 1989 (**BPS Act**). Acknowledging that new section 100AA is preferable in the sense that it contains a time limit (while section 269 of the RBNZ Act contains no such limitation), it is also considerably broader in the scope of information that is captured. The BPS Act provision is restricted to information obtained for the purposes of only Part 5 of the Act, while section 269 of the RBNZ Act pertains to information required under subpart 1 of Part 6. Section 44 of the Financial Markets Authority Act (**FMA Act**) provides a power to make confidentiality orders (in preferable form to amended section 100 of the Bill, given the constraint on length), but it does not contain a comparable provision to new section 100AA. Though cited in the RIS, sections 59 and 60 of the FMA Act do not expressly exclude the OIA as proposed section 100AA does.

9.20 As noted, a compelling reason for the section 100AA is not evident on the material available. The RIS refers to protecting sources from retaliation, and to the generalised suggestions of submitters during the 2025 consultation. The OIA already protects information that is commercially sensitive or provided in confidence, and the RIS is clear that both the Ministry of Justice and the Ombudsman do not agree with the proposed exception. Though the RIS claims a principled reason for new section 100AA, that reason is not disclosed. Further, the RIS describes a provision that "would allow the Commission to receive and protect information under clearly defined conditions, subject to appropriate safeguards."[24] That is not the nature of the provision that has eventuated in the Bill.

9.21 The important public role of the Commission, and its existence as a public entity with corresponding obligations of transparency and accountability, do not appear to have factored significantly in the analysis of options. Arguably, the Commission's role and functions are wider, and often of greater public interest, than those entities with comparable exceptions. A more nuanced analysis is required.

9.22 Finally, the drafting of the provision complicates the process for determining whether disclosure is permitted. The OIA will, by virtue of proposed section 100A(3), apply if any of conditions in subclause (2) are met, meaning the task for the Commission will be required to straddle – and meet the legal requirements – of two regimes:

(a) Proposed section 100A(2) includes conditions such as: the provision of consent, 'proper interest' in the information, whether information is in summary form, and whether the disclosure is for the purpose of (or connected with) carrying out the Commission's functions. The Commission will be required to assess whether

[24] Above, n 3, at [86].

any of these apply and, where they do, treat the request for information as an OIA request. This is an area primed for dispute. In the case of consent, is it anticipated that consent cannot be unreasonably withheld, and where information has been provided by a source but relates to the requestor, is the requestor's consent sufficient? On what basis will the Commission determine that a person has a proper interest? There is a risk that the Commission will interpret this narrowly or permit considerations about *why* information should be withheld (i.e., the OIA part of the assessment if there is a proper interest) to colour the determination of whether a person has a proper interest. Similarly, whether information is in 'summary form' is subjective, and there can be considerable argument around the disclosure of information for the purposes of, or in connection with, the performance or exercise of any function.

(b) Proposed section 100AA removes from corporates their right to personal information under Part 4 of the OIA, for which there are restricted withholding grounds. This can have implications for natural justice, with limited oversight over the body that is both investigating (or otherwise) and making the decision on disclosure. We note again that the one Ombudsman investigation between 1 July 2023 and 30 June 2025 in which a final opinion found that information had been unjustifiably withheld was a case in which a body corporate sought access to personal information.

(c) If information is provided by the Commission to another agency, for example under section 100AA(2)(d), or happens to also be held by another agency, an individual may be able to obtain that information by request (whether intentionally or inadvertently) to that other agency. This may become more likely during the passage of time, as sensitivities associated with the information decline, but the Commission alone remains subject to confidentiality.

9.23 On balance, the Law Society recommends clause 53 is removed. There is no compelling or principled reason for this broad exception, and the existence of similar provisions is insufficient justification. The alternative procedural and institutional improvements identified as an alternative option in the RIS could be pursued instead, including specific guidance from the Ombudsman which outlines the approach taken to confidential and commercially sensitive information held by the Commission.

9.24 If the provision is to remain, we recommend significant revision. This could include:

(a) Reducing the period of confidentiality and removing the ability of the Commission to indeterminately extend it. The latter could also be addressed by restricting the period of extension but allowing this to occur multiple times (thereby requiring fresh consideration by the Commission and allowing the Commission to ensure availability of information if circumstances have changed).

(b) Restricting the confidentiality to information relating to specific functions (which should be identified for inclusion in the provision by a demonstrable need or the particular sensitivity of information typically associated with that function).

(c) Amending subclause (2) to include considerations such as natural justice, or otherwise retaining the application of Part 4 of the OIA. While the refusal grounds under section 27 of the OIA may be seen as insufficient to protect sources, an amended section 100AA could include a more specific provision relating to the protection of sources. This may enable the greater disclosure of information without putting the source at risk.

(d) Requiring a written record be made of any decision to refuse information on the basis of section 100AA.

(e) Requiring that a refusal as referenced at (d), above, is accompanied by a statement as to the requestors ability to complain to the Ombudsman (whether under the OIA or OA) or otherwise requiring provision of an administrative review by the Commission.

Section 99AA – disclosure to public entities

9.25 We note that section 99AA of the Act is another provision enabling the disclosure of information by the Commission, not under the OIA but to public service agencies, statutory entities, the Reserve Bank of New Zealand, and the New Zealand Police. At present, the Bill proposes no amendment to this.

9.26 Given the policy objectives of the confidentiality amendments in the Bill, it may worthwhile considering whether section 99AA should be amended to provide that, prior to release under s 99AA, the owner and/or subject of the information should be consulted unless there is good reason not to. Such an approach would be consistent with the Ombudsman's guidance in respect of consultation with those who may be affected by the release of information, while also not requiring consultation in circumstances such as where it would prejudice the maintenance of the law.

10 Other matters

10.1 Some other minor and drafting issues arise in the Bill, and these should be addressed before the Bill is progressed. These include:

New section 3(8)

10.2 The words 'any party' should be amended to 'acquiring party' because if the target has acquired something, then it is already included in the analysis.

Clause 8

10.3 Clause 8 proposes to repeal section 46. Section 46 manages the overlap between prohibitions in Part 2 and 3, ensuring that one or the other will apply rather than both. The explanatory note suggests this section is no longer needed because of section 83(6), which reads 'A person is not liable to a pecuniary penalty under both section 80 and this section in respect of the same conduct.' We note this proposed amendment was not consulted on in the targeted review of the Act.

10.4 The provision of section 83(6) only means that a person is not liable to pecuniary penalties under Parts 2 and 3 and would leave a person open to any enforcement response that is not a pecuniary penalty. In practical terms, this means a person is liable

to receive a pecuniary penalty under Part 3, and various other remedies from Part 6 relating to Part 2 conduct.

10.5 By removing this provision, it opens legitimate merger negotiations to application of Part 2, including potential criminal sanctions for cartel conduct in breach of section 30. This will result in uncertainty for businesses in merger situations where they would also need to consider deal documentation under cartel tests, with narrow exemptions in New Zealand compared to other counterpart jurisdictions. Further, it is contradictory to the objective of the Bill – making New Zealand a more attractive place to invest.

10.6 Repealing section 46 would exacerbate these issues and leave New Zealand as an outlier internationally in terms of the risk profile of deal documentation that is not caught by the relevant regimes.

10.7 As a result of these concerns, the Law Society recommends deletion of clause 8 and retention of section 46.

Penalty clauses for breaches of new sections 47E and 47F

10.8 We note that clauses 33 to 36 amend sections 83 to 85 of the Act so that breaches of new sections 47E and 47F fall within the scope of existing enforcement mechanisms, including pecuniary penalties, divestiture orders, injunctions and damages. We query whether this is intended, given the introduction of new section 74D, which provides a specific enforcement pathway for breaches of conditions. In our view, it would be more coherent for enforcement of breaches of new sections 47E and 47F to be addressed under the new section 74D framework.

Clauses 43 and 45

10.9 Clause 43 amends section 98 to require a person to 'reproduce' information in corrupt or otherwise lost documents under compulsion. Clause 45 amends section 98H in a similar manner in relation to documents concerning section 36A. We are concerned that persons who are unable to reproduce such documents may be exposed to compliance action for failing to meet the requirements of a compulsory notice. To mitigate this risk, we recommend amending new subsection 98(1)(ba) and new subsection 98H(1)(c). For example, an amendment could clarify that the person is required 'if necessary, to use their best endeavours to attempt to…', or similar wording that reflects a best-efforts standard.

Schedule 1, clause 33

10.10 Schedule 1 inserts a new Part 7 into Schedule 1AA of the Act. Clause 33 sets out the commencement provisions in relation to existing proceedings. The wording of subsection (2) is unclear. It provides:

> *The amendments apply on and from the commencement date to proceedings in respect of an acquisition that takes place on or after the commencement date, whether the proceedings are commenced before, on, or after the commencement date.*

10.11 We suggest the Select Committee consider seeking advice about the clarity of these commencement provisions so that certainty can be achieved prior to the Bill progressing.

Jesse Savage

Vice-President