New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Competition Policy Team
Building, Resources and Markets
Ministry of Business, Innovation and Employment

By email: competition.policy@mbie.govt.nz

Tēnā koe

Re: Promoting Competition in New Zealand – A targeted review of the Commerce Act 1986

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the Promoting Competition in New Zealand – a targeted review of the Commerce Act 1986 discussion document (**Discussion Document)**, prepared by the Ministry of Business, Innovation and Employment (**MBIE**).

1.2 The Law Society supports the intention to review the competition settings in the Commerce Act 1986 (**the Act**) to ensure they remain fit for purpose, noting in particular the length of time since the settings were last reviewed.

1.3 This feedback has been prepared with input from the Law Society's Commercial and Business Law Committee.[1]

2 Mergers

The substantial lessening of competition test

Overall performance of the current regime

2.1 The Law Society considers that the current merger test in section 47 (**SLC Test**) remains suitable as an overarching conceptual framework for assessing mergers.

2.2 However, the Law Society agrees there are concerns, as noted in the Discussion Document, relating to 'killer acquisitions' and acquisitions in digital markets. As the Commission will be aware, the Australian Competition and Consumer Commission (**ACCC**) is conducting an inquiry into digital platform services, and it would be useful to consider the outcome of this when the ACCC releases its final report in March 2025.

[1] More information about this committee can be found on the Law Society's website: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/commercial-li/

Mergers in Digital Markets

2.3 Like in other jurisdictions, the current regime may struggle to appropriately regulate mergers in digital markets. As the Discussion Document notes, an alternative analytical framework may be required when reviewing mergers in digital markets.

2.4 Given the vast diversity in the products, technologies, and business models in this space (and the complex value chains and ecosystems they form), there may be a greater risk that the immediate competition effects of such transactions are not apparent (and therefore not notified to the Commerce Commission (**the Commission**)). Similar concerns can arise with the expansion into related markets by digital businesses. It may not be immediately clear whether such expansion would affect competition or not (whether in the core market or the related market). In such contexts, it may be difficult for the Commission to prove a substantial lessening of competition is likely to occur for the purposes of section 47.

2.5 The Law Society considers it would be reasonable for the Commission to have an expanded set of regulatory tools to address the challenges posed by mergers in digital markets, particularly as the means for creating market power in digital markets may differ from traditional markets. For example, as emphasised by the ACCC, the accumulation of non-public data (particularly in the hands of large data platforms) can create significant barriers to entry. It is not necessary for data to be acquired solely through mergers. Some of the proposals in the Discussion Document may help provide the Commission with the necessary regulatory tools. For example, the proposed call in power, the proposed amendments to the phrase 'assets of a business' in section 47, and the proposal to empower the Commission to make industry codes.

Blocking mergers

2.6 Any benefits that may have otherwise accrued for the merging parties and any wider efficiencies that may have been generated will be lost if the merger is blocked. Where mergers are perceived to be *unnecessarily* blocked, there may also be an impact on business confidence. If companies (particularly overseas companies) feel they will not be able to achieve a certain market position, this may reduce their incentives to launch products or invest in the New Zealand market. There may be some flow on effects on New Zealand's reputation as an investment destination and its 'ease of doing business' ranking.

Prevention of harmful mergers

2.7 While the SLC test has generally prevented harmful mergers, economic literature is increasingly suggesting that industry concentration has become more prevalent and is harming competition.

Creeping acquisitions

2.8 The Law Society considers that targeted alignment with the proposed reforms in Australia could improve the clarity of the approach the Commission would take in applying the SLC test in relation to creeping acquisitions. Accordingly, we support the proposal to do so.

2.9 It would also make sense for the same test to apply throughout the Act.

2.10 In the Law Society's view, the requirement to consider acquisitions in the past three years should not be exclusive. Consideration should be given to allowing the Commission to consider any other series of related transactions.

Acquisitions of nascent competitors

2.11 The Law Society agrees with the concerns about killer acquisitions. As a theoretical framework, it considers the current SLC test is broad enough to apply to such acquisitions. However, there are likely to be issues in identifying such transactions and assembling evidence to establish that they are likely to substantially lessen competition. There are also likely to be additional difficulties for early-stage businesses (e.g. firms which are making losses due to investments in R&D or product development). Given the high failure rates for such businesses, it will be difficult to assess whether a target business is likely to become a real competitor in the future such that there is a substantial lessening of competition if the competitor is 'killed'. Theoretically, there could arise a situation for which there are efficiencies in such a business being absorbed by a larger competitor, who could subsidise the product development or R & D until a commercial return can be achieved.

Alignment with Australia

2.12 The Law Society agrees it is sensible to align New Zealand's competition law with Australian competition law. Businesses will then be able to look to Australian case law, guidance and practice, which helps maintain business certainty.

Substantial degree of influence

2.13 The Law Society agrees it is desirable to provide greater certainty to transacting parties in this area. However, it may be difficult to define a bright line rule which conclusively determines what type of acquisition (for example, what percentage shareholding) does not give rise to competition concerns. As such, we consider the current general approach should remain, with scope for minor amendments to improve certainty. Allowing a case-by-case assessment and treating the question of whether there is a substantial degree of influence as a question of fact, ensures the relative security of the decision.

2.14 Consideration could be given to bright-line rules which clarify what circumstances without doubt raise competition concerns. For example, similar to the Singapore model, a 30% - 50% shareholding acquisition could give rise to a rebuttable presumption of influence.

2.15 It would also be helpful to list the factors that can be considered in determining substantial influence. Such a list should arguably be non-exclusive to ensure it remains effective and flexible.

3 Assets of a business

3.1 The Law Society agrees that the treatment of 'assets of a business' would benefit from improved clarity. We consider amending section 47 to simply refer to 'assets' would likely achieve the clarification needed to ensure that section 47 applies to partial acquisitions.

3.2 For example, if a dormant company or a holding company that does not carry out business wishes to monetise any specific assets it holds (e.g. customer datasets), it may choose to sell them. In considering whether section 47 applies, the question would become whether that data is an asset of a business. This question is irrelevant to assessing competition in a market. The focus should be on whether any acquisition (be it of any asset or shares) substantially lessens competition in a market.

3.3 The Law Society also considers further clarity could be achieved by defining the concept of 'assets' in a non-exclusive manner similar to the Australian definition referred to on page 16 of the Discussion Document.

3.4 Overall, the Law Society considers both proposed amendments, subject to drafting, would enhance clarity in section 47, increasing certainty and business confidence.

4 Mergers outside the clearance process

4.1 The Law Society agrees with the Discussion Document that the voluntary merger regime is working well and a change to a mandatory clearance regime is not required. However, in relation to the proposal to strengthen the Commission's powers, we consider:

(a) Call-in powers and company-specific mandatory notification powers would be useful tools in the Commission's regulatory toolkit, in particular given the concerns discussed around digital market mergers.

(b) Consideration would need to be given to how call-in powers are structured. Presumably the exercise of such powers would make clearance/authorisation under sections 66 or 67 mandatory for transactions that are called-in, and the current clearance/authorisation regime would apply. Under such parameters, despite the call-in powers being exercised, there would remain a possibility that merger parties may complete their transaction prior to the Commission completing its review. Therefore, call-in powers may need to be complemented with "stay" powers. While court injunctions would remain available to the Commission, stay powers could be exercised at a lower evidential threshold, than that required for an injunction.

(c) Company-specific mandatory notification powers would be unlikely to be widely used but would still be a useful tool for the Commission.

5 Anti-competitive conduct

Facilitating beneficial collaboration

5.1 Businesses are increasingly faced with pressure to take action on environment, social and governance issues and often find that their sustainability goals are best achieved through a collaborative approach, resulting in competition law risk.

5.2 The Commission previously issued guidelines to assist businesses in understanding when collaboration with competitors for sustainability objectives may raise competition issues under the Act. Although helpful, the guidelines are not sufficient to give businesses the level of certainty needed. It remains that a case-by-case assessment is required, often resulting in delay and high costs for businesses. For this reason, options 1 and 3 are not preferred.

5.3 If, under option 2, the Commission would be issuing rulings on whether specific collaborative transactions breach the prohibitions in the Act, then this option may have merit. This is because each ruling would be treated as an example or precedent to learn from and follow. It could, however, increase the volume of material that a party may need to consider before entering into a collaborative arrangement, which would increase cost. It may be simpler and more accessible if a limited number of class exemptions or generalised rulings, as considered by option 4, are made to authorise classes of conduct that may be exempt from the prohibitions.

5.4 For option 5, consideration would need to be given to what can be considered a 'small business.' As the New Zealand market is much smaller than that of Australia or the United Kingdom, this could inadvertently provide a much broader exemption than intended. Further, for truly small businesses, a fee waiver may make no difference as the financial burden of legal and consulting fees incurred in preparing the authorisation may be prohibitive.

5.5 Many countries have successfully adopted safe harbour provisions or issued exemptions to provide legal certainty, reduce regulatory burden, and facilitate beneficial collaboration. For example, in the United States, certain collaborative agreements enjoy safe harbour protections if they meet specific thresholds. In Australia, the ACCC granted major supermarkets conditional authorisations to continue their collaboration on soft plastics recycling.

6 Code or rule-making powers and other matters

6.1 The Law Society is generally supportive of enabling the Commission to make industry-specific codes. Australia provides an example that can be followed, and this would support the alignment of our competition laws with Australia.

6.2 However, while industry codes would be a useful tool to complement the Commission's market studies, they may also be a source of added regulatory cost. It would also be important to consider their legal structure. For example, if industry codes are to be secondary legislation, this could have the benefit (depending on the precise nature of the empowering provision) of ensuring government scrutiny and support for the Code.

6.3 Lastly, the Law Society considers an industry code, when implemented, should be subject to a review timeframe at which point consultation with stakeholders is repeated.

Any other issues

6.4 There is one additional matter the Law Society wishes to raise.

6.5 Before 2022, sections 45, 36(3) and 7(2) of the Act (exceptions concerning intellectual property (**IP**) rights) provided certain "safe harbours" for agreements relating to IP rights and their enforcement. Sections 45, 36(3) and 7(2) were repealed by the Commerce Amendment Act 2022. The effect of this, especially when combined with other amendments introduced at the same time (in particular, changing the misuse of market power test in s 36 to an effects test and expanding the definition of what amounts to cartel conduct in s 30), was to make it significantly more difficult for companies to

resolve IP disputes quickly and easily. The Law Society raised concerns about those amendments at the time.[2]

6.6 IP practitioner experience since 2022 has been that the repeal of these provisions is creating practical difficulties for businesses. The uncertainty around whether various IP contracts (particularly settlement agreements and IP licensing agreements generally) can be entered into and how they should be structured, even where those agreements are for genuine business reasons and there is no anti-competitive intent, is creating an unnecessary overlay of delay and expense. For example, IP disputes between trade competitors that would previously have been resolved in a routine manner, allowing parties to re-focus quickly on core business activities, can no longer be settled without the need for specialist competition law advice in addition to the primary IP law advice. This is placing an unnecessary burden on business and is hampering productivity.

7 Court injunction powers

7.1 The Law Society considers the injunction powers in the Act should be updated to align with other legislation and to allow for performance injunctions.

8 Next steps

8.1 We would be happy to answer any questions or to discuss this feedback further. Please feel free to get in touch via the Law Society's Law Reform & Advocacy Advisor, Shelly Musgrave (shelly.musgrave@lawsociety.org.nz).

Nāku noa, nā

Jesse Savage
Vice President

[2] NZLS submission on the Commerce Amendment Bill 2021, 30 April 2021 can be found here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Commerce-Amendment-Bill-IP-exceptions-30-4-21.pdf; further comments from the NZLS responding to MBIE's response dated 22 June 2011 can be found here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/l-EDSI-MBIE-response-Commerce-Amendment-Bill.pdf.