

# DOES COMPETITION LAW NEED TO CHANGE?

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MAJOR REVIEWS ANNOUNCED TODAY



With the 2024 year coming to a close the NZ Government, Commerce Commission (**Commission**) and Ministry of Business, Innovation and Employment (**MBIE**) are looking to shake up the competition law landscape:

- Andrew Bayly, Minister of Commerce & Consumer Affairs, alongside MBIE has announced 2 upcoming reviews of:
  - **The Commerce Act 1986 (the Act)** – to ensure the Act remains fit for purpose to boost productivity and elevate the state of competition in New Zealand; and
  - **The Commission’s governance settings** – with the aim of ensuring that the Commission is equipped to deal with its expanded responsibilities and able to execute on its strategy in a more efficient and effective way.
- The Commission has shared its Enforcement Priorities for 2025.

## MATTHEWS LAW COMMENTS

- Matthews Law welcomes the broader review of the Commerce Act (while the Commerce Act has seen some updates with the changes to the cartel prohibitions and s 36 substantial market power provisions, these have been ad hoc without a wider examination of the Commerce Act as a whole).
- It is reassuring to see that the Government is conscious of the fine balance between increasing competition and efficiency and the cost of regulatory compliance.

A number of points picked up in MBIE’s discussion draft reflect points we raised in our submission on the Mergers and Acquisitions Guidelines review, available [here](#).
- With the Commission’s ever-growing role, and number of regulations it must enforce, we would encourage the reviews to consider (where appropriate) if there is also the ability to simplify the regimes and reduce regulations. We would also welcome consideration of an anti-overlap provision to prevent parties being held liable for the same conduct under different provisions, particularly like that in Australia if more sections (such as concerted practices) are added.
- The Commission’s commitment to being a more active and courageous regulator and its enforcement priorities, with a focus on benefit to the economy and vulnerable consumers, sit well with the broader reviews.

# GOVERNMENT REVIEW OF COMPETITION LAW



## REVIEW OF THE COMMERCE ACT

Minister Bayly has announced a targeted review of the Commerce Act 1986 (the Act) to ensure it remains fit for purpose to boost productivity and elevate the state of competition in New Zealand.

The review is intended to address concerns about market concentration, issues identified in market studies, issues highlighted by OECD and also follows the Australian competition policy review. MBIE has released a discussion paper which sets out initial views and questions on the Act. See **Annex A** for a quick summary of the points the Commission is consulting on.

The review picks up many themes we have seen overseas agencies concerned about (for example increased concentration of markets) as well as looking to harmonise with Australia (and picking up on concerns identified in Australia). At the moment the report seems to take a pragmatic approach recognising that the voluntary pre-merger notification scheme may be fit for purpose for New Zealand but wondering if there should be greater notification requirements. We are also delighted to see behavioural undertakings on the table as we have been advocating for these a long time.

However, there are also some key issues missing from the review, which also warrant discussion, including:

- whether or not the per se prohibitions on cartel provisions are excessively broad – the review approaches this by suggesting more exceptions are needed;
- should we have anti-overlap provisions as Australia does; and
- could we simplify or reduce the amount of regulation?

MBIE is seeking feedback on these issues by **7 February 2025** with an aim to reach a Cabinet decision by **April 2025**.

Matthews Law will be making submissions on these important changes and welcomes the opportunity to advocate on behalf of businesses and their concerns.

[Get in touch with us](#) to see how we can help.



## REVIEW OF THE COMMISSION'S GOVERNANCE

Minister Bayly has also requested a review of the Commission's governance structure and performance to ensure they have the right skill sets to deliver given the Commission's expanded role in various sectors.

This would include ensuring that the Commission (and its Board) has:

- the commercial knowledge and skill set necessary for its engagements, investigations and decision making.
- the correct structural approach (for best outcomes and accountability and collegiality).
- the capacity to develop and deliver on an overarching strategy (informed by a clear mission statement).
- a measurable basis for prioritising its resources (based on its strategy).
- engaged with potential opportunities to operate more efficiently and efficiently.

The review is in great hands led by respected economist and former chair of the Commission Dame Paula Rebstock, with Professor Allan Fels (Professor of Law, Economics and Business at the University of Melbourne and Monash University and previous Chair of the ACCC (and equivalent authorities) from 1989 until 2003) and David Hunt (a leading economist and Deputy Chair of ACC).

The review is expected to be completed by **May 2025**.

# THE COMMISSION'S ENFORCEMENT PRIORITIES

The Commission has shared its enforcement priorities for 2025 emphasising its commitment to being **a more active, engaged and courageous regulator**. This includes overcommitting its litigation fund by \$2 million to \$3 million per year to enable it to take more cases to court. The Commission's key aims, which are clear from its enduring and specific enforcement priorities, include taking action on issues that make a difference to the economy and protecting vulnerable consumers.

Alongside (and in line with) its enduring priorities, the Commission announced specific priorities that it will be focusing on, namely:

- **Bid rigging cartels:** Particularly in the infrastructure sector and in relation to public procurement processes or where public money is involved.
- **Non competes:** The Commission will be focusing on non competes, both where these amount to cartel conduct and where they substantially lessen competition.
- **Unconscionable conduct:** The Commission has signalled that it may be bringing its first case in the second half of 2025.
- **Illegal online sales conduct:** With online sales expanding at a rapid rate (expected to reach \$9 billion by 2028) problematic conduct is also on the rise, including: fake reviews, misleading scarcity claims, drip pricing and subscription traps.
- **Grocery sector:** Both breaches of the specific grocery provisions (GICA/Code), but also generally including FTA breaches.
- **Telco sector:** The Commission will be paying close attention to misleading marketing (and sales/billing) practices including absolute statements that cannot be realised.
- **Motor vehicle finance:** This is a long standing area of focus but there remains a number of traders who need to review their compliance with the CCCFA. The Commission currently has 3 cases before the Court (El Cheapo Cars, Go Cars and Second Chance Finance).

The Commission reemphasised its commitment to its enduring priorities, namely:

- Cartels;
- Anti-competitive conduct;
- Actions that support the Commission's market and economic regulation functions;
- Product safety; and
- Vulnerable consumers.



# THE COMMISSION'S ENFORCEMENT PRIORITIES

## QUESTIONS YOU SHOULD ASK YOURSELF



### **Do you have a sufficient compliance program?**

The Commission was clear that its expectation is that businesses will invest appropriately in compliance.

We encourage businesses to use the end of the year as a time to reflect on whether they have sufficient processes or compliance programmes in place, especially if they operate in one of the areas that the Commission has signalled as an enforcement priority area.

### **Who are your customers?**

Think carefully about whether any consumers you service (or provide goods to) could be classified as “vulnerable consumers”, and if so, what you are doing to protect these consumers’ interests.

### **What are your processes for ensuring compliance with FTA?**

The Commission noted it is committed to obtaining meaningful penalties / fines and is hoping to continue its trajectory of increased penalties, so now is a great time to tighten up FTA compliance. Make sure any representations you make are accurate and substantiated, and you have processes for keeping these up to date.

If you need help with compliance. [Get in touch with us to see how we can help](#)

# KEY CONSIDERATIONS IN THE COMMERCE ACT REVIEW

## Merger regime

- **Issue 1:** Whether to change the current ‘substantial lessening of competition’ (SLC) test (and align with the proposed reforms in Australia) to include:
  - **Entrenchment of market power:** to clarify and make explicit the SLC test to include ‘creating, strengthening, or entrenching a substantial degree of market power’ in a market;
  - **Creeping acquisitions:** where the Act would allow acquisitions in the past 3 years to be combined when assessing the competitive impact of the current acquisition; and
  - **Other provisions (non-merger):** If changed, whether the SLC test changes also apply to non-merger provisions in the Act.
- **Issue 2:** Whether to provide greater clarity on the ‘substantial degree of influence’ test (when assessing whether a partial acquisition provides control over business or assets).
- **Issue 3:** Whether to amend “assets of a business” under s 47 to be just “assets” or change the definition of “assets” under the Act.
- **Issue 4:** Whether NZ’s voluntary merger regime is working. Or whether there should be broader powers to stay/hold mergers, call in mergers under the clearance/authorisation regime, and whether certain mergers should require mandatory notification.
- **Issue 5:** Whether the Commission should be able to accept behavioural undertakings to address concerns with mergers and if so, under what circumstances. We are pleased to see the inclusion of this, given we have advocated for consideration of behavioural undertakings for many years.

## Anti-competitive Conduct

- **Issue 6:** Facilitating beneficial collaboration under the Act, including potential carve outs for specific types of collaboration.
- **Issue 7:** Whether NZ should adopt a concerted practices prohibition, similar to Australia or a customised prohibition targeting anti-competitive conduct that arises from harmful tacit collusion (eg info sharing without safeguards).

## Code for rule-making powers and other matters

- **Issue 8:** Whether the Commission should be able to implement industry codes or rules to promote competition. The aim is to adopt a more flexible and proportionate response to competition concerns.
- **Issue 9:** Whether the injunction provisions within the Act need updating.
- **Issue 10:** Whether the existing protections for confidential information (including within the Official Information Act) are sufficiently protecting confidential information or whether the Commission’s ability to issue confidentiality orders (under s 100 of the Commerce Act) should be strengthened. This is an issue that needs addressing and we will be submitting on this.
- **Issue 11:** Some more minor and technical amendments of the Commerce Act.