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Economic Development, Science and Innovation Committee
Parliament House, Parliament Buildings,
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Dear Secretary,

Commerce (Promoting Competition and Other Matters) Amendment Bill 2025

Introduction and Standing

1. I am a competition law academic based in Australia, with a research focus on merger control, cartel regulation, and comparative competition law across the Asia-Pacific region. I have an ongoing interest in New Zealand competition law and have followed the development of this Bill since the Ministry of Business, Innovation and Employment (MBIE) published its discussion document in December 2024. I am grateful for the extension to lodge this written submission.
2. I am writing in a personal academic capacity. This submission does not represent the views of my institution.
3. My submission is confined to a single issue: the proposal in clause 8 of the Bill to repeal section 46 of the *Commerce Act 1986*. I address the balance of the Bill's measures separately below but, for completeness, I wish to make plain that I broadly welcome those other reforms. My concern with the section 46 repeal is not ideological opposition to stronger competition enforcement; it is a technical concern about an unintended legislative consequence that could expose ordinary merger transactions to criminal liability.

General Support for the Bill's Reform Program

4. The *Commerce (Promoting Competition and Other Matters) Amendment Bill 2025* represents the most comprehensive reform of New Zealand's competition law framework in nearly two decades. As an Australian observer, I am well placed to note that many of these reforms bring New Zealand into closer alignment with international best practice. In some respects they go further than reforms recently enacted in comparable jurisdictions.
5. I particularly welcome the following measures.

- **The expanded merger control powers**, including the Commission's new call-in power, suspensory orders, and the aggregation of serial acquisitions



over a rolling three-year window. These address a genuine enforcement gap identified in the Commission's own public decisions and align New Zealand's approach with the direction taken by Australia under its 2025 merger reform package.

- **The strengthened SLC test**, particularly the adoption of the “creating, strengthening or entrenching” formulation, which gives the Commission clearer tools for dealing with acquisitions that entrench market power rather than merely creating it.
 - **The new objective predatory pricing test**. Pricing below an appropriate cost benchmark is genuinely harmful to competition, and a clearer statutory test improves both enforcement consistency and business certainty.
 - **Expanded enforcement remedies**, including corrective action orders and strengthened whistleblower protections, which will materially improve the Commission's ability to remedy infringements effectively.
 - **The statutory collaborative activity notification regime**, which provides a more transparent and efficient pathway for businesses to obtain certainty about joint ventures and other collaborative arrangements.
6. Taken together, these reforms reflect a mature and evidence-based approach to competition policy, and I encourage the Committee to support them. My concern with clause 8 should be understood in that context: it is a specific, targeted objection to one provision that I believe is misconceived, not a criticism of the Bill's broader ambitions.

The Proposed Repeal of Section 46

What section 46 currently does

7. Section 46, headed “Saving in respect of business acquisitions”, provides that nothing in sections 27 to 30 of the Commerce Act applies in respect of an acquisition of assets or shares to which section 47 applies. It is a short provision that performs a structurally important function. It prevents a merger transaction from being simultaneously assessed and condemned under both Part 2 (restrictive trade practices) and Part 3 (business acquisitions).
8. The provision reflects a foundational principle of competition law architecture that is shared across all comparable jurisdictions: mergers are structurally different from anti-competitive agreements, and the two regulatory regimes operate on distinct normative and analytical foundations. Mergers require forward-looking assessment of competitive effects, bespoke structural remedies, and — through the clearance regime — the capacity for ex ante certainty. Anti-competitive agreements involve ongoing conduct assessed under per se or rule of reason standards, with pecuniary penalties and, in New Zealand's case since April 2021, criminal sanctions.

The government's stated justification

9. The Bill's explanatory note offers a single sentence of justification for repeal: section 46 is “considered no longer necessary given section 83(6) already provides that a person will not be liable to a pecuniary penalty under both Parts 2 and 3”.



10. With respect, this reasoning is plainly insufficient. Section 83(6) addresses only pecuniary penalties and says nothing about the far broader range of legal consequences that section 46 currently prevents. I address each category of consequence below.
11. The criminal cartel liability risk is the most serious consequence of repeal and, in my submission, the most pressing reason for the Committee to recommend amendment.

The criminal cartel liability risk

12. Since April 2021, cartel conduct under sections 30A to 30J of the Commerce Act carries criminal sanctions of up to seven years' imprisonment for individuals and substantial pecuniary penalties for corporations. The cartel prohibition is a *per se* offence: unlike section 27, it does not require proof that the conduct substantially lessened competition.
13. The definition of a "cartel provision" in section 30A is broad. It captures provisions that have the purpose or likely effect of price fixing, market allocation, or output restriction between competitors. A merger between competing businesses necessarily involves conduct that fits within each of these descriptions: the parties are combining their customer bases (market allocation), their pricing structures (price fixing), and their productive capacity (output restriction).
14. Section 46 currently insulates this conduct from the cartel provisions. Without it, no equivalent protection exists. The cartel provisions sit at sections 30A to 30J, which fall outside the scope of section 83(6)'s double-penalty protection. The government's reliance on section 83(6) therefore offers no protection against criminal prosecution at all.
15. The practical consequence is stark: the parties to a merger agreement between competitors could, following repeal, be exposed to criminal cartel charges in respect of the merger agreement itself and the steps taken to implement it. This outcome cannot have been intended. It would be without precedent in any comparable jurisdiction, and the Bill contains no alternative protection to fill the gap.

Unenforceability of merger agreements under section 27

16. A merger agreement between competitors is, on its face, a "contract" containing "provisions" that may substantially lessen competition in a market — potentially satisfying the elements of section 27. Section 46 currently prevents such a characterisation. Without it, a merger agreement could be challenged as an anti-competitive arrangement under section 27.
17. Critically, section 27(4) provides that contracts or arrangements in breach of section 27 are "unenforceable" as against the parties. This is a remedy that operates independently of pecuniary penalties and is therefore entirely outside the scope of section 83(6). A competitor or other third party with standing could seek a declaration that a merger agreement is unenforceable — a weapon that would have no parallel in any comparable competition law system.



18. Section 82 of the Commerce Act confers a right to recover damages on any person who suffers loss or damage by reason of a contravention of Part 2. Following repeal of section 46, merger parties would face potential damages claims from any person who could establish loss from the merger agreement, independently of and in addition to the Commission's merger review process. This would enable strategic litigation by competitors seeking to block or impose costs on transactions.

Clearance provides no protection against Part 2 claims

19. Section 69 of the Commerce Act provides that section 47 does not apply to transactions that have received Commission clearance or authorisation under Part 5. This protection is expressly limited to Part 3. Without section 46, a transaction that has been formally cleared by the Commission could still face challenge under section 27, or criminal prosecution under the cartel provisions, in respect of the same underlying transaction.
20. This consequence would fundamentally undermine the certainty that the clearance regime is designed to provide. Merger clearance would cease to offer the protection that business parties reasonably rely upon when deciding whether to proceed with transactions.

Ancillary restraints

21. Merger agreements routinely contain provisions that are ancillary to the transaction itself: non-compete covenants, non-solicitation clauses, exclusivity arrangements, and protocols for sharing operationally sensitive information during the interim period. These provisions are standard commercial terms, typically necessary for the viability of the transaction and the protection of goodwill.
22. Without section 46, each of these ancillary provisions would be independently assessable under sections 27 and 30. This would create uncertainty for transacting parties and their advisers that is incompatible with efficient and commercially certain M&A practice.

Comparative Analysis

23. No comparable jurisdiction has repealed its equivalent of section 46 without providing an alternative mechanism to prevent merger agreements from exposure to anti-competitive agreement liability. The position in relevant comparators is as follows.
24. In the United Kingdom, Schedule 1, paragraph 1 of the *Competition Act 1998* explicitly excludes mergers qualifying as concentrations under the *Enterprise Act 2002* from the Chapter I prohibition on anti-competitive agreements. This exclusion was retained without modification by the *Digital Markets, Competition and Consumers Act 2024*.
25. In the European Union, the "concentration privilege" under the EU Merger Regulation (Regulation 139/2004) achieves a functionally equivalent outcome: transactions qualifying as concentrations are assessed exclusively under the



EUMR, and ancillary restraints are covered by the clearance decision. The core principle remains intact notwithstanding incremental judicial development at the margins for below-threshold transactions.

26. In Australia, there is no single blanket provision equivalent to section 46, but the *Competition and Consumer Act 2010* compensates through specific targeted protections: non-compete clauses in business sale agreements are exempt from the cartel provisions under section 91(4A) where they relate solely to the protection of goodwill, and the expanded joint venture exemption covers arrangements “reasonably necessary” for the venture. The new mandatory merger regime introduced in 2025 does not disturb these protections.
27. In the United States, the absence of a statutory equivalent to section 46 is compensated by the judicially developed ancillary restraints doctrine, under which restraints that are reasonably and narrowly necessary to facilitate a legitimate transaction are assessed under the rule of reason rather than per se standards. The 2023 Merger Guidelines acknowledge the concurrent application of Sherman Act section 1 and Clayton Act section 7 but reflect decades of judicial and enforcement practice calibrating the boundaries.
28. New Zealand, uniquely among these comparators, proposes simple repeal without any replacement mechanism. The result would be a lacuna without precedent in modern competition law.

Process Concerns

29. I note, as a matter of process, that the repeal of section 46 was not consulted upon during MBIE’s December 2024 discussion document, nor does it appear to have been foreshadowed in publicly available Cabinet minutes. It was not raised as a reform option during the public consultation process that closed in February 2025. Its appearance in the Bill accordingly came as a surprise to the legal profession and to business stakeholders.
30. This is not merely a procedural point. The absence of prior consultation means that the government has not had the benefit of input from merger practitioners, the legal profession, or business on the practical consequences of repeal. It is precisely the kind of consequence that consultation is designed to surface. The select committee process now constitutes the primary forum in which those consequences can be properly assessed.

Recommendations

31. I respectfully make the following recommendations to the Committee.
 - **Primary recommendation:** Clause 8 of the Bill should be amended to retain section 46 in its current form, or in a revised form that maintains its essential function of excluding merger transactions from the anti-competitive agreements regime in Part 2. The government’s reliance on section 83(6) is not an adequate substitute for the existing protection.
 - **Alternative recommendation:** If the Committee considers that some relaxation of the current section 46 protection is warranted, it should, at a



minimum, ensure that any replacement provision: (a) expressly protects merger parties from criminal cartel liability in respect of the merger agreement and its implementation; (b) preserves the enforceability of merger agreements under section 27; and (c) ensures that Commission clearance provides effective protection against all Part 2 claims, not merely section 47 claims.

- **Consequential recommendation:** The Committee should seek advice from the Commerce Commission and from MBIE as to whether the current text of clause 8 is consistent with the government's stated intention of avoiding double liability, and whether any transitional provisions are required to address transactions entered into before and after the commencement date.

Conclusion

32. The Bill's broader programme of competition law reform is timely, evidence-based, and well-directed. I welcome it. The repeal of section 46, however, is a provision whose consequences have not been adequately assessed. The justification that section 83(6) renders it redundant does not withstand scrutiny. It would expose the parties to ordinary merger transactions to criminal cartel liability, render merger agreements potentially unenforceable at the suit of third parties, and undermine the certainty that the Commission's clearance regime is designed to provide.
33. No comparable jurisdiction has taken this step without providing an alternative mechanism to prevent this outcome. I urge the Committee to recommend the deletion or amendment of clause 8 to address these concerns.
34. I would be pleased to appear before the Committee by video to elaborate on any aspect of this submission, and I am available at short notice given the extended deadline.

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