TCF submission on the Commerce Act Review

17 February 2025

Introduction

1. Thank you for the opportunity to make a submission on the review of the Commerce Act 1986 (the Act).

2. The following comments are provided on behalf of the New Zealand Telecommunications Forum (TCF). The TCF is the telecommunications sector's industry body which plays a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of the sector and consumers. TCF member companies represent 95 percent of New Zealand telecommunications customers. Our members include network operators, retail service providers and the tower companies that own and operate cell towers.

3. In this submission we focus on the following issues from the discussion document:

    a. Issue 6: facilitating beneficial collaboration

    b. Issue 7: anti-competitive concerted practices

    c. Issue 8: industry codes or rules.

Issue 6: facilitating beneficial collaboration

4. MBIE has asked whether further clarity could be added to the law to allow for beneficial collaborations and conduct, in light of the challenges facing the economy that require novel and coordinated solutions in the public interest. Our answer is "yes".

Telecommunications and beneficial collaboration

5. The telecommunications sector is highly competitive, but there are cases where beneficial collaborations between operators:

    a. Are necessary to ensure efficient end to end interconnection and operation of public networks

b. Have potential to deliver innovations and services no single operator can deliver alone

c. Provide benefits to consumers that are in the public interest.

6. The Telecommunications sector is different to many other sectors in New Zealand. It has been the subject of sector-specific regulation since the passage of the Telecommunications Act 2001 (the Telco Act). As a result, TCF members are well versed in complex regulatory and competition law processes. The TCF has regular engagement with the Commerce Commission and government stakeholders on law reform, regulatory refinement and industry initiatives.

7. As a sector with regulatory, legal, policy and economic resources TCF members have been able to deliver beneficial collaborations delivering effective outcomes for consumers. For example to:

   a. Improve rural connectivity in rural and uneconomic areas (this has been done through the Rural Connectivity Group).

   b. Prepare for and coordinate activity during emergencies (through the Telecommunications Emergency Forum).

   c. Understand and plan for the impacts of climate change (through the development of sector wide climate scenarios). We anticipate further collaboration will be needed on sustainability and resilience issues.

   d. Provide number portability services that enable consumers to easily switch between providers (through the TCF process).

   e. Develop technical solutions and share intelligence for dealing with scams (through the TCF Scams Working Group).

   f. Undertake self regulatory functions (provided for under the Telco Act).

   g. Implement Commerce Commission requests to standardise information provided to consumers to enable them to compare products and services.

   h. Provide extended coverage, capacity and prioritised availability to emergency services personnel (through the Public Service Network).

   i. Help the Government address digital equity challenges.

8. Sector collaboration takes place in different ways, but is often facilitated through the TCF. This collaboration works well, with the TCF helping to facilitate technical cooperation while providing protocols and structures that guard against anti-competitive conduct. This kind of collaborative forum should be able to continue in the public interest and we would want to ensure that any changes made as a result of this policy process does not inadvertently constrain it.

9. Some collaboration has a legislative mandate, such as the statutory authorisations provided for under Part 4AA of the Telco Act, to facilitate the ultra-fast broadband and rural broadband initiatives to enable fixed and mobile providers to work together. The statutory authorisation provided legal certainty to facilitate the kind of investment and collaboration needed to efficiently deliver consumer benefits and the establishment of the Rural Connectivity Group.

10. Other collaborations in the sector are the result of negotiated arrangements with the Government. More often than not commercial or policy-driven initiatives, even where suggested, encouraged or promoted by government are substantially more complex to achieve. Government initiatives do not provide legal certainty as to the competition law implications. Government departments can be unwilling to engage in a statutory authorisation process or to formally engage with the Commerce Commission to provide a proactive authorisation or clearance. In most cases our members are required to manage the cartel risk themselves and in some cases they are asked to indemnify the relevant government department driving the initiative from any liability under the Commerce Act. This significantly raises the costs and risks to parties looking to deliver on requirements of government-led initiatives, substantially reduces incentives to assist and co-invest, and limits the pool of potential contributors to those who are sufficiently resourced to manage a set of elevated risks and costs.

There is a lack of regulatory certainty on beneficial collaborations

11. While the telecommunications sector has been able to facilitate collaboration in some areas, the TCF is of the view that the lack of regulatory certainty in relation to beneficial collaborations undermines opportunities for innovation and improved consumer outcomes.

12. The experience of our members is that uncertainty about whether areas of collaboration are acceptable can limit collaboration that is in the public interest. Often the inherent risks of breaching the cartel prohibitions of the Act require such careful navigation that beneficial collaborations never get off the ground or, if they do, they require complex, costly and inefficient processes to get them over the line.

13. Parties to a potentially beneficial collaboration are faced with unenviable trade-offs – very high fines and potential criminal penalties if they get it wrong, no certainty on whether their collaboration might fail the relevant exception on a technicality, and a high cost regulatory engagement requirement.

14. The goal should be to enable more innovative and contemporary collaborations over time, where such collaboration is unlikely to undermine incentives to innovate and invest competitively and is likely to result in a net benefit to consumers.

15. Existing mechanisms are not sufficient:

    a. The authorisation regime (where the Commission can authorise agreements that might otherwise be anticompetitive) is clunky and arduous to navigate, requiring costly expert and economic evidence and lengthy consultation processes.

b. The lighter touch collaborative activity process (introduced after criminalisation of cartel behaviour came into effect in 2021) hasn't fixed the problem. There has only been one application under this process (it was declined) and there is no case law on the subject.

c. The Commerce Commission has provided helpful guidance in its Competitor Collaboration Guidelines, but these guidelines are non-binding and high level and do not provide parties to a potential collaborative activity with much certainty.

16. To provide the necessary certainty we support the following options: clearer guidance from the Commerce Commission (option 1) and class exemptions (option 2).

Guidance (option one)

17. Clearer guidance from the Commerce Commission is needed. We shouldn't need to wait for a case for guidance to be provided. The Commission should work with sectors to develop guidance. The guidance should be referenced in the Act, so that companies could legally rely on it (providing a safe harbour).

Class exemptions (option two)

18. An EU-style block exemption regime has the potential to provide legally binding guidance which specifies the conditions under which certain types of collaborations will be regarded as more beneficial than harmful to competition and therefore deemed to be lawful. A block exemption regime should be as dynamic as the markets it relates to, including regular review of exemptions to ensure they:

a. provide more rather than less certainty and clarity based on the feedback of market participants, and

b. reflect evolving types of market opportunities that would benefit from collaborative activity.

19. We think a block exemptions approach, similar to the EU, would be beneficial. Sectors could work with the Commerce Commission to anticipate the types of collaborations needed over say a ten year period, and get advance clearance. As an example, collaboration to deliver the enhanced public safety network could have benefited from a principles-based but sufficiently detailed joint technology development and exploitation exemption, rather than bespoke fact-specific and expensive competition law assessments.

Issue 7: anticompetitive concerted practices

20. MBIE is considering whether there is a gap in New Zealand competition law concerning coordinated conduct. And if there is, should it be plugged with a new prohibition on concerted practices? In essence MBIE is considering whether there are latent examples of tacit collusion, not captured by the current cartel prohibition, causing markets to underperform. And if so, whether there is sufficient evidence to justify a change in the law to address it.

21. Our view is that there is unlikely to be evidence of tacit collusive conduct which cannot already be effectively managed under the Commerce Act. Importantly we think that the Commission's cartel investigation powers together with their relatively new market studies powers, including the ability to recommend additional market or sector regulation for underperforming sectors, provides an appropriate balance at this time. The introduction of grocery sector reform following the grocery sector market study is one such example.

22. In workably competitive markets you would expect to see businesses responding to the publicly available price changes and product offerings of their rivals, without collusion. Price changes over time can accordingly trend upwards or downwards as rivals respond to price. In addition product innovations and inclusions, and other non-price factors are also signals of the evolving nature of consumer demand and supply constraints and opportunities within a market. For example, in the past decade retail consumers have continuously benefitted from fixed and mobile products delivering more data, faster speeds and greater inclusions. Prices have either increased or decreased with some retail telecommunications providers inevitably following pricing of others, while the incentive to operate more efficiently and innovate more consistently has never been greater.

23. In more concentrated markets where common inputs and published prices are the norm you would expect price changes and/or uniformity across a market to be more pronounced but nonetheless also consistent with a workably competitive market. For example, in fixed fibre line telecommunications markets, Chorus (a major wholesale provider) will set its input price, which typically results in changes to the prices of all retailers at the same time. We would not generally consider this sort of alignment an example of underperforming markets. It provides retailers with national consistency of inputs and preserves competition at the retail level.

24. We are concerned that there's a risk of too many false positives arising from ordinary commercial conduct which would inhibit the performance, incentives and dynamics of telecommunications markets. There is not currently sufficient evidence of latent collusive activity to justify the introduction of a concerted practice prohibition at this stage.

Issue 8: industry codes or rules

25. MBIE is considering whether the use of more rule making powers could provide a more flexible and proportionate response to addressing competition concerns. One way to do this could be to amend the Commerce Act to enable the making of industry codes or rules to promote competition.

26. Save as outlined above in relation to the possibility for the Commission to be involved in setting legally enforceable block exemptions, we think this proposal would be inappropriate and amount to allowing Commerce Commission law making. Competition rule making requires significant policy decisions. We think there are good arguments that policy settings should be set by Parliament and/or the executive and independently implemented by the regulator. We are not convinced that giving the Commission additional rule making power, essentially able to determine the policy settings outside of Parliament, would be consistent with good regulatory practice.

27. The Commerce Commission already has sufficient powers under the Commerce Act and sector specific legislation such as the Telco Act. Significant uncertainty would result if the Commission could unilaterally decide to make new rules. There would also be administrative costs and burdens.

28. For further information please contact kim.connolly-stone@tcf.org.nz in the first instance.

[ends]