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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Procompetitive Industrial Policy – Note by New Zealand

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This document reproduces a written contribution from New Zealand submitted for Item 7 of the 143rd OECD Competition Committee meeting on 12-14 June 2024.

More documents related to this discussion can be found at
www.oecd.org/competition/pro-competitive-industrial-policy.htm

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1. Introduction

1. This paper is a contribution to Competition Committee's call for country contributions to the Roundtable on Procompetitive Industrial Policy to be held on 12 June 2024.
2. Industrial policy and action in markets by Governments are often motivated by goals other than the promotion and protection of competition, such as securing sustainable economic growth, and maintaining financial and fiscal stability. Policy initiatives can inadvertently reduce the incentives or ability of businesses to compete, which impacts consumers, productivity, growth, efficiency and innovation in markets. Sometimes it may even be necessary to reduce competition to implement a particular policy. This can create a tension between meeting the policy goal and maintaining competition in markets.
3. Nonetheless, we consider it is important that policymakers factor competition into their analysis of policies and initiatives that will change markets. As experts in competition and the way competition plays out in specific markets, the New Zealand Commerce Commission (NZCC) engages, and we encourage other competition agencies to engage, in the policy process to promote competition and ensure it is in the minds of policymakers.
4. In this paper we firstly provide background on the approach of the NZCC with respect to the policy-making process in New Zealand. We then explain why we consider it is important for competition agencies to engage in the policy process, despite often having the status of an independent agency. We then outline three ways in which the NZCC has effectively engaged in the policy process, which has, at times, directly led to the Government implementing pro-competitive policies.

2. Background

5. The NZCC is an Independent Crown Entity (ICE). This independence requires that we are an impartial promoter and enforcer of the law. Our independent status ensures we are not subject to direction from Government when carrying out our enforcement and regulatory roles, however we are accountable to the Government for our performance. We are funded principally by (and at the discretion of) the Government with some funding through levies for particular regimes. Our independence is important for our statutory decision-making but there are plenty of checks and balances. For example, operating under a judicial model means our enforcement outcomes are ultimately decided by the courts, and our processes are subject to judicial review in the courts.
6. Despite our ICE status, we do engage and provide input on policy development, usually through the Government's policy agencies but sometimes direct to Ministers. Where we do engage, we are mindful that our contribution should draw on our competition and regulatory expertise and experience. We also focus on advising on the best way to achieve the Government's objectives in a policy area, rather than on advising what the Government's objectives should be.
7. Historically, our policy input has been largely ad-hoc and bespoke to the issue at hand. This could involve, for example, subject-matter experts talking about our current regulatory or enforcement responsibilities, or applying their knowledge to a proposed

policy and how it will impact competition. This engagement is both proactive (Commission-led) and reactive (led by other Government agencies).

8. Although ad-hoc input is still the most common way we contribute to policy, in recent years we have stepped further into the policy space. This is particularly through our new market studies function, which allows us to recommend to the Government, where we consider it appropriate, changes to enhance market performance. We have also advocated for the consideration of competition by policymakers through publishing Competition Assessment Guidelines, which assist public officials to consider competition in decisions that have potential to influence markets.

9. We recognise some risks in the NZCC's engagement in the policy process given our status as an independent enforcer of laws, however we consider we have found a good balance between maintaining our independence and inputting into policy where it is right to do so.

3. Importance of competition agencies engaging in policy

10. There are a range of reasons why the NZCC engages, and we encourage other competition agencies to engage, in the policy process. These include:

It is a Government expectation.

11. The New Zealand Government expects its regulatory agencies such as the NZCC to adopt a whole-of-system view, and a proactive, collaborative approach to the maintenance and enhancement of the regulatory systems within which we work. In addition, our Ministers, in their Letter of Expectations, have been clear that they expect us to provide our expertise to support policy development.

Engagement can help ensure the NZCC has the best possible tools to do its job.

12. When the Government is considering new or amended functions or tools for the NZCC, engagement in the policy process is critical to ensure that we are given tools and functions that are workable and most likely to achieve the Government's objectives.

13. We have knowledge of best practices and the latest thinking around effective means of competition law enforcement, often acquired through our unique networks and relationships (for example, through the OECD Competition Committee), which are not found elsewhere in Government.

14. The NZCC also raises policy issues proactively. As an agency with a growing range of regulatory systems and legislation that we implement and enforce, we need workable legislation that allows us to enforce the laws that we have been tasked with. This means we should let policymakers know when there are barriers to undertaking our role as intended.

We possess knowledge and expertise not available elsewhere in Government.

15. The NZCC has 'on-the-ground' experience not possessed in the same depth anywhere else in Government, for example competition in markets. We also have a deep understanding of a range of sectors as a result of previous investigations, market studies, and regulatory functions.

16. This means that we are uniquely placed to offer a view on:

- possible challenges with implementation especially relating to impacts on sectors and the resource implications of new or expanded functions;

- how we would be likely to go about undertaking a new or expanded role if we were given it; and
- whether there are alternative tools that may be necessary or desirable to better achieve the Government’s objectives.

It is another way for the NZCC to achieve its objectives in its strategic framework.

17. Upfront engagement in policy processes can help to achieve our strategic objectives: that New Zealanders are better off, markets work well, and consumers and businesses are confident. For example, a meeting with a Government agency to ask questions and help test policy and regulatory proposals, based on our experience, may help to prevent a policy or regulation that has an unduly negative impact on competition from being introduced. This could have as much (or more) of an impact as an investigation into anti-competitive conduct, or could even avoid the need for a time-intensive market study in subsequent years.

The NZCC can identify matters that would help the Government to achieve its objectives.

18. There can also be matters that do not relate to our current role, but which might come to our attention, that the Government may want to address to achieve its overall policy objectives. For example, in the course of an investigation or through a market study, we might identify conduct that is causing competitive harm to consumers that is not currently a breach of legislation. We consider it appropriate for us to proactively raise these issues with the Government because – as above – we are likely to be made aware of issues that others may not.

4. Ad-hoc input into the policy process

19. In terms of ad-hoc input to specific policies, there are a range of formal and informal ways the NZCC ‘reactively’ engages in policy-making being led by other Government agencies.

20. The most common formal opportunities to engage include commenting on draft Ministerial briefings, Cabinet papers, discussion papers, and submitting to Select Committee. We field questions and feedback from other Government agencies on an informal basis, for example through regular meetings and sharing of work programme priorities. We are also members of cross-Government groups, such as the Council of Financial Regulators, which help to facilitate engagement on policy and other regulatory matters across Government.

21. We have found an increasing number of Government agencies reaching out to us for policy guidance in recent years as awareness of our competition expertise has increased amongst policymakers, and they become more aware of the impacts of policy on competition. We have a lot of engagement with our monitoring agency, the Ministry of Business, Innovation and Employment (MBIE), which is responsible for most of the legislation that the Commission implements and enforces.

22. In addition, there are proactive ways we put issues on the policy agenda. These include raising matters directly with Ministers and through our Government agency networks, or through regular catch-ups we may have with them.

Example: Misuse of market power reform

23. A recent example of the NZCC advocating for policy change was with New Zealand's change to its misuse of market power (abuse of dominance) test, which involved us initially lobbying policymakers on an informal basis and finished with us providing a formal submission to Select Committee.

24. In April 2023, Parliament amended section 36 of the Commerce Act, which provides New Zealand's misuse of market power test. This amendment expanded what was solely a purpose-based 'take advantage' provision to include an effects-based 'substantially lessening competition' test. There are many reasons why we considered a change was necessary. The most compelling reason was that the previous test failed to capture all anti-competitive conduct, and it was complex and difficult to apply and enforce, resulting in little private or public enforcement.

25. The NZCC had long advocated for a law change prior to the change in April 2023. We made it clear through submissions and other avenues, over a number of years, that we considered the test unworkable, and we took no cases under it during the last decade.

26. We initially raised concerns with MBIE on an informal basis. MBIE published an Issues Paper in November 2015 seeking views on section 36, as well as a number of other Commerce Act issues, which we provided a submission on. Then, in June 2016, we sent our Minister of Commerce and Consumer Affairs a supplementary submission, which critiqued a number of points made by other submitters. In this context, MBIE considered it appropriate to launch a cross-submission process. We then submitted on MBIE's subsequent Discussion Paper, which proposed a change to the test. Finally, in April 2021, after the amendment Bill had its second reading, we provided a written submission to the Select Committee, and later appeared at the Select Committee in-person where we outlined the reasons for us supporting the change in test.

27. Our efforts to advocate for this change also saw us engaging in an overseas jurisdiction. In 2017, Australia amended its misuse of market test, like New Zealand, from a 'take advantage' test to a 'substantially lessening competition' test. In 2014, we provided a submission to the Australian Competition Policy Review (Harper Review) outlining our support to the Review's recommendation to change Australia's test in this way. We provided this submission because a review of our test had been proposed in New Zealand at that time, and a change in Australia's test would make a change in New Zealand's test more likely, particularly given the goal of a trans-Tasman single economic market, which has been committed to by New Zealand and Australia.

5. Market studies

28. In October 2018, market studies was added to the NZCC's functions, and these studies have seen us move further into the policy space through the recommendations we make as part of our findings. Where we consider it appropriate, we can make recommendations for changes to enhance market performance. Although any recommendations we make are non-binding, the Government is required to respond to our findings and recommendations within a reasonable period. The NZCC has completed market studies into three industries: retail fuel, retail grocery, and residential building supplies, and we are currently undertaking a market study into personal banking.¹ Our

¹ Further information on our market studies function, including copies of our final reports, is available here: <https://comcom.govt.nz/about-us/our-role/competition-studies>

completed market studies have seen the Government accept almost all of our recommendations, resulting in new legislation and new regulatory functions for the NZCC.

29. ‘Shining a light’ on a sector in this way allows us to analyse whether perceived issues actually exist, and, if so, allows us to explore what policy action can be taken to enhance market performance and recommend this to Government. This ability to explore policy options through a specific channel was previously uncharted territory for the NZCC.

30. Our recommendations to Government in the retail fuel and retail grocery studies resulted in the Government passing legislation and assigning new regulatory functions in these sectors to the NZCC:

- The Fuel Industry Act 2020 assigned the NZCC the role of regulating the supply of engine fuel used in land transport in New Zealand. This legislation was enacted as a result of our findings in the retail fuel market study which found a number of shortcomings in the competitiveness of markets for petrol and diesel. This legislation promotes competition by requiring wholesale fuel suppliers to offer a spot price at which they will sell fuel to wholesale customers at storage terminals, and setting requirements of wholesale supply contracts to allow greater contractual freedom for resellers to compare offers and switch suppliers.
- The Grocery Industry Competition Act 2023 provides for the establishment of a new Grocery Commissioner and grocery sector regulatory function in the NZCC to provide a strong oversight and ongoing focus on this sector. This legislation was in response to the NZCC’s market study into the grocery sector. It introduces a regulatory regime for designated grocery retailers for the purpose of promoting competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand. The NZCC can seek significant penalties against regulated grocery retailers and individuals who breach the Grocery Supply Code of Conduct.

31. Further, our market study into residential building supplies found that the building regulatory system incentivises designers, builders and building consent authorities to favour familiar building products over new or competing products, and makes it difficult for new or competing products to be introduced and for suppliers to expand their businesses. Our market study recommended that the Government investigate reducing barriers to certification and appraisal. The Government has recently announced that it intends to enact legislation to increase competition in the building materials market by the end of 2024, including enabling the use of building materials from trusted overseas jurisdictions without the need for new products to be certified domestically.

Example: Anti-competitive land covenants

32. We have found that our market studies enable us to identify competition issues that neither we, nor policymakers, might otherwise be aware of. A good example of this is anti-competitive land covenants – where a party places a legal restriction on how land can be used. These restrictions can limit competitors’ access to suitable sites for establishing competing businesses. We observed such covenants in each of our retail fuel, grocery and building supplies market studies.

33. Our final report on the retail grocery market study recommended banning the use of restrictive covenants that prevent retail grocery stores from being developed. The Government accepted this recommendation and passed the Grocery Industry Competition Act 2023, which amended the Commerce Act to make certain types of covenants which

impede the development of retail grocery stores as per se prohibited.² Previously, such covenants were assessed under the general, effects-based ‘substantial lessening of competition’ test.³

34. Our final report on the residential building supplies market study included a recommendation that the Government conduct an economy-wide review into the use of land covenants, exclusive leases and contractual provisions with similar effect. The Government accepted this recommendation, and MBIE subsequently ran such a review.

35. To educate and raise awareness of the risks of anticompetitive land covenants, we took it upon ourselves to run a covenants compliance programme in early 2023. We released a fact sheet on anti-competitive land covenants,⁴ and as follow-up work flowing on from the market study, we offered compliance training presentations to major building merchants on the law around covenants. This training included the factors they should consider when lodging or enforcing covenants that could potentially impact competition.

6. Competition Assessment Guidelines

36. In addition to policy engagement on specific matters through ad-hoc engagement and market studies, the NZCC has also advocated for the consideration of competition by policymakers generally, by publishing Competition Assessment Guidelines.⁵

37. As mentioned above, we are often approached for competition advice from other Government agencies for competition guidance. However, despite our best efforts to encourage other agencies to assess the impact on competition of proposed policies, we found that we did not have any practical, written guidance that could assist officials to carry out such an assessment. We found that it is difficult for public officials with other important priorities and limited competition expertise to assess the effect of policies on competition.

38. Because of this, and largely inspired by the OECD’s Competition Assessment Toolkit,⁶ we carried out a joint advocacy initiative with MBIE to develop a practical tool for policymakers to carry out an initial competition assessment. This resulted in us jointly publishing the Competition Assessment Guidelines in September 2022, which is a practical tool written in plain English, and designed to assist public officials, as well as businesses and other interested parties, to consider competition in decisions and policy initiatives that influence markets.

39. To raise awareness of the Guidelines we held an event at our offices when the Guidelines were launched which was attended by public officials. After the launch, we provided targeted training on the Guidelines for staff from the NZCC and other public agencies, as well as other groups interested in learning more about competition.

40. Broadly speaking, since our campaign to promote the Guidelines, we have seen an increased understanding amongst public officials of what competition is, why it is

² Commerce Act 1986, section 28A

³ Commerce Act 1986, section 28

⁴ Available here: https://comcom.govt.nz/__data/assets/pdf_file/0027/309942/The-Commerce-Act-Anti-competitive-land-covenants.pdf

⁵ Available here: <https://comcom.govt.nz/about-us/our-policies-and-guidelines/competition-assessment-guidelines>

⁶ Available here: <https://www.oecd.org/competition/assessment-toolkit.htm>

important, and matters that should be considered in designing policy to avoid negative impacts on competition.

41. We are continuing to engage with Government agencies about how to improve the effectiveness of competition in policy, particularly around good regulatory practice in considering competition in new policy and law reform. A recent example is us supporting the New Zealand Treasury to consider how the Regulatory Impact Statement (RIS) process can be enhanced to encourage competition. An RIS is published for lawmakers by the responsible Government agency for every new piece of legislation or regulation. It contains a high-level summary of the problem being addressed, the options and their associated costs and benefits, the consultation undertaken, and the proposed arrangements for implementation and review.

7. Conclusion

42. Despite policy-making often being motivated by goals other than the promotion of competition, we consider it is important that competition agencies engage in the policy process to ensure it is factored into policy analysis.

43. As outlined above, despite the NZCC's independent status, we manage to engage in the policy process in a number of ways, with the goal of ensuring policies are as pro-competitive as can be, allowing consumers to enjoy the benefits of competitive markets despite a changing policy landscape.