SIMPSON GRIERSON

Simpson Grierson's submission on the Commerce (Promoting Competition and Other Matters) Amendment Bill

February 2026

Introduction

1. Simpson Grierson thank the Committee for the opportunity to submit on the Commerce (Promoting Competition and Other Matters) Amendment Bill (the Bill). Our submission is prepared as at 3 February 2026.
2. Simpson Grierson is one of New Zealand's leading commercial law firms. Our competition practice advises major New Zealand and overseas corporates on all aspects of competition law, including mergers and acquisitions, restrictive trade practices, cartel investigations, misuse of market power, and competitor collaborations.
3. The following submission has been prepared by James Craig and Achi Simhony, partner and senior solicitor respectively, who are members of the competition team at Simpson Grierson. Any questions about the comments made within this submission should be addressed to either of them.
4. This submission covers the key proposed changes to the Commerce Act 1986 that are reflected in the Bill that Simpson Grierson are supportive of, and the amendments that we consider may have unintended risks or consequences and should be either re-considered or amended.
5. This submission represents Simpson Grierson's views and does not necessarily represent the views of our clients.

Aspects of the Bill that we support

6. Simpson Grierson are generally supportive of the Bill.

7. In particular, outlined below are two key areas of proposed reform reflected in the Bill that Simpson Grierson support.

Behavioural undertakings

8. We are supportive of the Bill's amendment to allow the Commerce Commission (**Commission**) to accept behavioural undertakings to resolve concerns with merger clearance/authorisation applications (new section 69A). This amendment is consistent with the wider regime in the Commerce Act, as the Commission already can accept behavioural undertakings under other parts of the Act (for instance as set out in section 74A). Further, this amendment will promote consistency between the Commission and equivalent regulatory bodies in other jurisdictions such as Australia, the European Union and the United Kingdom, which increasingly accept behavioural undertakings in appropriate cases.

Withholding confidential information

9. We are also supportive of the Bill's proposed amendment which gives the Commission powers to withhold information provided by parties in a clearance/authorisation application from disclosure under the Official Information Act (**OIA**) (new sections 100 and 100AA). This proposed amendment represents a significant improvement on the status quo by providing more certainty for parties regarding the information that will be protected, what information will be released, and the circumstances surrounding its release. This will give increased assurance to those providing information to the Commission which in turn benefits the Commission in terms of the quality of the information provided to it.

10. Currently, on many applications for clearance of business acquisitions that we are involved in, there will be multiple requests under the OIA for disclosure of party information to the Commission. This takes up significant time and cost for both the Commission and our clients in those acquisitions to respond to, and in turn has a chilling effect in terms of the information able to be provided to the Commission.

Simpson Grierson's concerns

11. We highlight the following key proposed amendments in the Bill that Simpson Grierson do not support in their current form, which are as follows:

Expanding the substantial lessening of competition test

12. The Bill proposes to expand the substantial lessening of competition (SLC) test by inserting a new section 3(2A) into the Commerce Act, stating: "[t]o avoid doubt, substantially lessening competition in a market may include creating, strengthening, or entrenching a substantial degree of power in the market." This will apply not just to the SLC test applied for mergers in section 47 of the Commerce Act, but also to sections 27 and 36 of the Commerce Act which deal with arrangements with the purpose / effect of SLC and misuse of market power respectively.

13. According to the Cabinet Paper for the Bill, this amendment is intended to confirm that the Commission is able to consider "killer acquisitions".

14. In our view, there is insufficient evidence that the Commission currently lacks the tools to address acquisitions of nascent competitors (i.e. killer acquisitions). The Commission has previously demonstrated its ability to block mergers involving nascent competitors in Woolworths and Foodstuffs' proposed acquisition of The Warehouse in the grocery sector. This indicates that the existing SLC framework is sufficient for this purpose.

15. We are also concerned that the proposed wording could be interpreted as deeming any creation, strengthening, or entrenchment of substantial market power to constitute a substantial lessening of competition. Such an interpretation risks capturing conduct that is pro-competitive or competitively neutral, including innovation and legitimate investment.

16. For these reasons, we consider that the existing SLC test remains appropriate and effective without the proposed amendments. We therefore support retaining the existing test and do not support the insertion of new section 3(2A).

17. Alternatively, new section 3(2A) should just apply to mergers under section 47, and not more widely to the SLC test in both section 27 and 36 as well, in order to address the "killer acquisition" concern that appears to have prompted this amendment.

Creeping acquisitions

18. The Bill expands the scope of the prohibition against anticompetitive business acquisitions to include "creeping acquisitions", being the acquisition of multiple small competitors that may not raise competition issues in isolation but do raise concerns when assessed cumulatively. Under this amendment, the Commission could assess patterns of small acquisitions by a business over a three-year period (new section 3(8)-(9)). While this aims to address anti-competitive patterns of acquisition, we see significant risks and unintended consequences in this approach.

19. Retrospective enforcement undermines legal certainty. Businesses need to rely on the lawfulness of a transaction at the time it occurs. Allowing the Commission to revisit transactions over a three-year period, and aggregate individual transactions as part of a pattern of transactions even if those transactions when considered individually would not have raised issues, creates uncertainty and may deter legitimate investments in New Zealand

20. The more appropriate approach is to assess each transaction in the context of the existing market structure at the time of the acquisition (as is already the case in relation to section 47 of the Commerce Act). Expanding the scope of this provision to include cumulative effects of other acquisitions adds unnecessary complexity and risk without a clear benefit for competition.

Predatory pricing prohibition

21. The Bill proposes to introduce cost based tests to define when conduct amounts to predatory pricing with no need to establish recoupment of strategic losses (new section 36C). Under this provision, a person with substantial market power that engages in predatory pricing will be deemed to have engaged in conduct that has the purpose, effect, or likely effect of substantially lessening competition. Predatory pricing is defined as pricing below the Average Variable Cost (AVC) or Average Avoidable Cost (AAC) for a sustained period, or pricing below Long-run Average Incremental Cost or Average Total Cost if the pricing is set for an exclusionary purpose

22. Currently, section 36 of the Commerce Act provides that a person with substantial market power must not engage in conduct that has the purpose, effect or likely effect of substantially lessening competition. In our view, this provision is sufficiently broad to capture problematic predatory pricing conduct

23. There is the practical issue that generally it is a good thing for consumers if businesses price their goods or services lower, so we should not be too quick to discourage this conduct.

24. The removal of the need to show recoupment of losses in order to establish a breach removes a significant safeguard in this respect – a safeguard that the Privy Council previously acknowledged was important in the earlier case brought by the Commerce Commission against Carter Holt Harvey. Accordingly, we consider the "recoupment" element should still need to be established (contrary to new section 36C(4))

25. We also do not consider that the wording "unless they are part of a pattern of behaviour over a sustained period" in new section 36(5) is helpful. Short term promotional pricing, other short term below cost pricing including one off specials or discounts, or instances where pricing is displayed incorrectly, are all aspects of normal competitive business and should not be discouraged even if frequently adopted.

Overlap between restrictive trade practices provisions and acquisition provisions

26. The Bill proposes repealing the existing "saving" provision contained in section 46 of the Commerce Act. This section provides that Part 2 of the Commerce Act, which governs restrictive trade practices, does not apply to contracts, arrangements or understandings giving effect to business acquisitions. The Bill's explanatory notes state that the repeal is justified because section 83(6) already provides that a person will not be liable for a pecuniary penalty under both Parts 2 and 3, thereby making section 46 unnecessary.

27. However, we consider that this has unintended consequences, given that business acquisitions by their nature can raise restrictive trade practice risks (i.e. a merger of two competitors could raise cartel conduct issues, and cartel conduct is a criminal offence). Even if a party cannot be penalised twice, it may still be investigated for the conduct under both tests and incur the resulting time and costs. Accordingly we recommend that section 46 be retained as currently worded.

Suspensory / call-in powers

28. The Bill proposes granting the Commission suspensory powers to pause and assess mergers for up to 40 working days (new section 47E), representing a significant extension of its existing powers and raising concerns about proportionality and commercial certainty for merging parties. Under the proposed amendment, the Commission would be able to suspend acquisitions where it has "reasonable grounds to believe" that suspension is necessary to protect competition while it forms a view on whether the transaction is likely to breach section 47 of the Commerce Act. For completed acquisitions, the acquirer would be required to "safeguard" the business during the suspension period, with the scope of the suspension determined by the Commission. The Commission will also have a "call in" power to require parties to apply for clearance for an acquisition (new section 47F)

29. These powers do not sit easily alongside New Zealand's longstanding voluntary merger control regime and the Commission's existing ability to seek injunctive relief from the Courts where intervention is warranted (under section 84). In the absence of clear evidence of systemic issues arising from non notified mergers, and given the Commission's already extensive investigative powers, it is unclear whether these suspensory powers are necessary. In our view it is preferable that the power to suspend acquisitions rests with an independent adjudicator (i.e. the Courts under the current injunctive regime in section 84).

Competition study

30. The Bill introduces the power for the Commission to carry out a study into any market, industry or sector in order to recommend the development of pro-competitive regulation (new section 51F). This would be in addition to the existing power for the Commission to conduct competition studies in Part 3A of the Commerce Act (for instance where directed to do so by the Minister under section 51)

31. Competition studies are extremely disruptive for the particular industry being investigated – usually taking a year to complete with multiple information requests from the Commission.

32. As a result, we consider the existing competition study powers should be retained (i.e. so the Minister can direct competition studies, and the Commission itself can carry out its own competition study if it considers it is in the public interest to do so), but without expanding those powers to give the Commission even greater powers to conduct a competition study on its own initiative.

Conclusion

33. In conclusion, we are generally supportive of the Bill and consider that the proposed reforms have the real potential to improve the functioning and effectiveness of New Zealand's competition law regime. However, as noted above, there are aspects of the Bill that may have unintended consequences, and we respectfully request that those be reconsidered.

34. We would be happy to address any queries and provide further information regarding this submission.

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