



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI



Regulatory charter

Competition system

2018

Executive summary

The overall objective of the competition system, which is shared with the consumer and commercial regulatory system, is to promote the long-term benefit of consumers.

The competition system does this in three ways:

- promoting competition
- protecting competition
- regulating for outcomes consistent with competition in markets with little or no competition, for the long-term benefit of consumers.

The purpose of this regulatory charter is to set out the roles and responsibilities for participants in the competition system, the relationships between them, and how the participants will work together to address gaps, overlaps and uncertainties.

The **Ministry of Business, Innovation and Employment (MBIE)** has primary responsibility for maintaining, monitoring, evaluating and improving the system.

The **Commerce Commission** is responsible for administering and enforcing competition law and the economic regulation regime.

A number of other organisations also have specific roles across the competition system to contribute to the desired outcomes for the system.

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1 Context

Purpose: Why do we need a regulatory charter?

MBIE has regulatory stewardship obligations under the State Sector Act 1988 to monitor the performance of the regulatory systems it oversees, which includes the competition system.

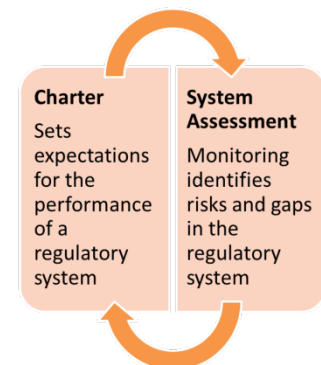
A regulatory system comprises the rules, institutions and practices which combine to achieve a given set of behaviours or outcomes. A charter is a tool designed to help manage oversight of a regulatory system, support cooperation between system participants and promote good regulatory stewardship.

What is in a regulatory charter?

This regulatory charter:

- sets clear expectations for what the regulatory system is intended to achieve
- describes the respective roles and functions of participants in various parts of the regulatory system
- sets out how system participants will work together
- outlines plans for ongoing monitoring and evaluation of the regulatory system.

Figure 1 Charters and System Assessments complement each other



Objective of the regulatory charter

The objective of the charter is to promote active and collaborative management of the competition system by reinforcing shared ownership for the system and assisting core government entities to identify good practice, address gaps and overlaps, opportunities to improve system performance, and manage risks in a timely and appropriate manner.

Charter review and management

The Competition and Consumer Policy team at MBIE has responsibility for the charter as part of its stewardship obligations. This charter has been developed in consultation with the key participants in the system, in particular the Commerce Commission and the Treasury.

Responsibility for maintaining and reviewing this document also sits with MBIE. A review should occur at least every five years. A charter review should include assessments of whether:

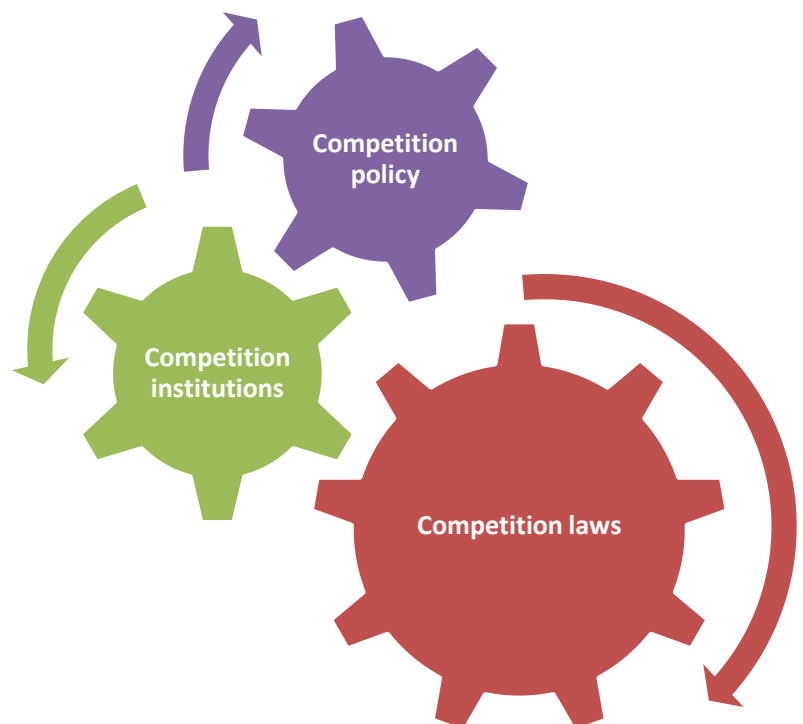
- system objectives, policy, behaviours or context have changed over time
- the charter document should be updated to reflect these changes
- progress has been made in addressing risks and closing gaps, and what can be improved.

2 Objectives and scope of the competition system

What is the competition system?

A competitive environment encourages firms to compete vigorously, creating incentives for them to innovate, lower prices, and deliver better quality goods and services that increase productivity and consumer welfare. We see competition as a market process of rivalry, where firms within a market compete for market share through price, quality, or innovation.

For the purposes of this charter and MBIE's regulatory stewardship obligations, the 'competition system' primarily relates to the **Commerce Act 1986**, and includes both the competition regime and the economic regulation regime under the Act. Other competition-related legislation also contributes to the objectives of the competition system, but they are outside the scope of the competition system as defined here as they are outside MBIE's regulatory stewardship obligations with respect to the Commerce Act. The system comprises three main components: competition policy, competition laws, and competition institutions. Each component is necessary for the functioning of the system as a whole.



The key **competition law** in New Zealand is the Commerce Act, which is at the core of the competition system. The Act protects the process of competition, and governs the substance and procedures of competition, and provides for economic regulation where necessary.

The **competition institutions** are the administrative structures and processes through which competition law and policy is implemented. This also includes the courts to the extent that they make determinations on aspects of competition law.

Competition policy consists of the broader government policies and settings beyond the Commerce Act. It primarily focuses on competition assessments in regulatory proposals, but can be wider. It is

about promoting the long-term benefit of consumers through competition, where feasible, and competition enforcement and economic regulation where necessary. It includes the regulatory and structural reform efforts aimed to stimulate more competitive markets, and drive economic growth and innovation.

Objectives of the system

The overall objective of the competition system is to promote the long-term benefit of consumers. This is achieved through two mechanisms:

- promoting competition in markets, as set out in the main purpose of the Commerce Act 1986
- regulating for outcomes consistent with competition where necessary, as set out in the self-contained purpose for economic regulation under Part 4 of the Commerce Act.

Competition is not an objective of itself. That is, while the Commerce Act regulates market processes, not outcomes, the possible outcomes from competition, such as enhanced consumer welfare, are why we value the process of competition.

We assume that the process of competition will drive the efficient allocation of scarce resources, minimisation of costs, and over time, greater innovation. It is these dynamic efficiency gains which will be of significant benefit to consumers in the long run.

Things that are in the long-term benefit of consumers include:

- Lower prices relative to what they might otherwise be without competition
- Higher quality goods and services
- Greater choice and variety of goods and services
- Efficient investment and innovation over time
- Maximising business capacity to adjust to changing circumstances domestically and abroad
- Higher incomes from productivity gains and better jobs.

There are high level principles that underpin the design and operation of all regulatory systems. The competition system is intended to achieve the following regulatory principles:¹

- *Growth supporting/compatible* – economic objectives are given an appropriate weighting relative to other specified objectives
- *Proportional* – the costs of enforcement should be proportional to the expected benefits
- *Flexible and durable* – the system has the capacity to evolve in response to change
- *Certain and predictable* – those subject to the Commerce Act have certainty as to their legal obligations and the regime provides predictability over time
- *Transparent* – rules development, implementation and enforcement should be transparent
- *Capable regulators* – the Commission should have the necessary people and systems to operate an effective and efficient regulatory regime.

¹ These principles are based on the Treasury's principles for best practice regulation.

Promoting competition in a small economy

The role of competition is important to achieving New Zealand's productivity potential. New Zealand has struggled to lift productivity over the last four decades, and competition policy can assist in turning this around.

Competition is especially important for New Zealand as a small economy, with the addition of being geographically isolated and having a geographically dispersed population. There is inherent tension in small economies between the presence of small numbers of firms in many industries, and the fact that these firms are often of sub-optimal size.

As a result, the New Zealand economy is characterised by:

1. High levels of concentration in markets
2. Some firms having smaller scale and often inefficient levels of production
3. High entry barriers in many markets
4. Limited resources available for competition law enforcement.

Poorly designed or maintained regulations can have a much greater impact on competition, innovation and investment in small economies compared to large economies. Large economies can pay relatively less attention to the efficiency aspects of competition policy, because productive efficiencies in many industries have been exhausted, and many firms should already be operating at minimum efficient scale to survive in larger markets.

New Zealand places a greater emphasis on maintaining flexibility in its competition law to allow for efficiency considerations (i.e. allocative, productive and dynamic efficiency gains from competition incentivise firms to make their production and distribution more efficient, and encourages innovation). It is essential for the competition system to be well-functioning and maintain strong linkages between general competition policy and sector-specific policy to ensure that regulation itself is not imposing barriers to entry and innovation.

Competition policy contributes to MBIE's overall goal to grow New Zealand for all, as efficient and fair markets are essential to driving productivity and economic growth. Competition policy is also fundamentally linked to the concepts of redistribution and equality, as it facilitates greater equality of opportunity by breaking down the barriers to fair competition that help protect incumbent firms with market power, and provides rules that protect vulnerable consumers from harm.

Why do we regulate the competition system?

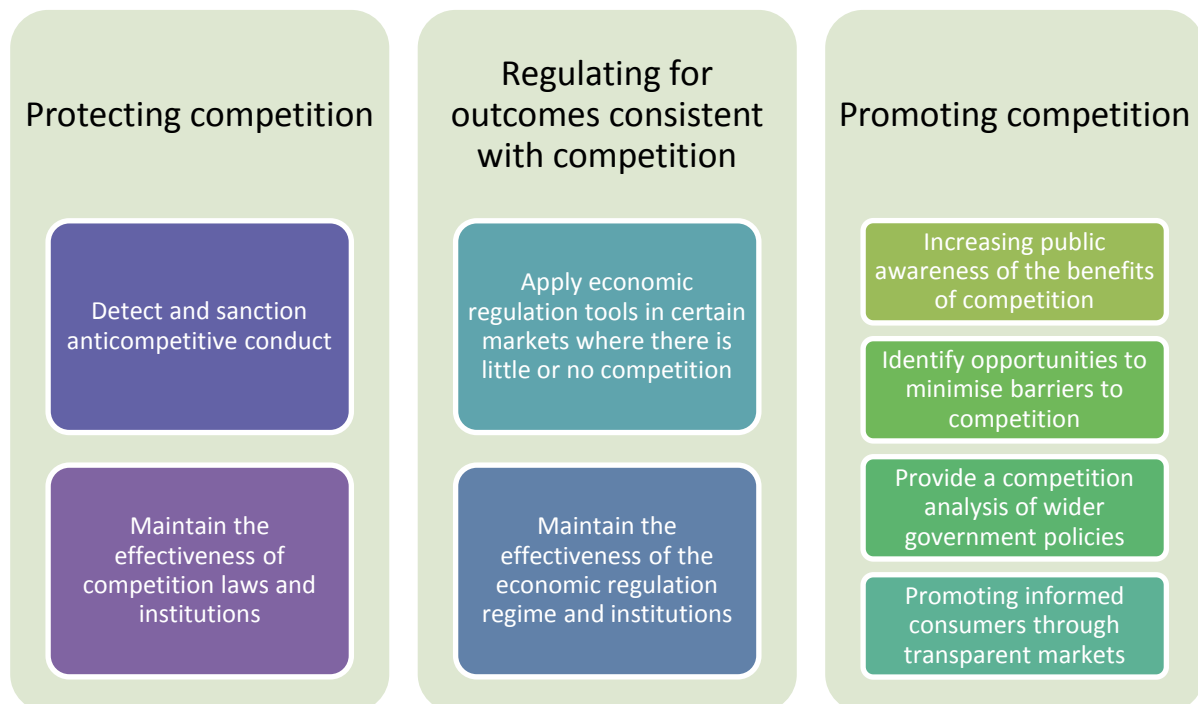
Competition is accepted as an important mechanism for promoting consumer wellbeing, and we rely on these competitive market mechanisms first to achieve the desired outcomes for consumers.

Where a market is unlikely to produce the desired outcomes that will benefit consumers in the long-term, for example in utility markets with natural monopoly characteristics, such as electricity, gas and airports, it is generally recognised that some sort of economic regulation is appropriate, to:

- address unproductive monopoly rents – to limit potential abuse of market power and the potential for suppliers to extract monopoly profits from consumers
- advance the “public interest” – sometimes regulation is considered necessary to protect the public from harm or to promote public interest objectives
- provide for workably competitive and efficient outcomes – designing a system of incentives and penalties that replicate the outcomes of competitive markets.

Approach to the competition system

The levers we have within the competition system to promote the long-term interests of consumers fall broadly within three areas, as set out in the diagram below.



Protecting competition

To maximise the benefits from competition we need to ensure that our competition laws and institutions remain at the leading edge of international best practice. Much of this work falls under the first area: *protecting competition* – prohibiting conduct that restricts competition (restrictive trade practices).

Our approach to restrictive trade practices provisions in the Commerce Act include the following considerations:

- Broad application
- Protects the competitive process not individual competitors
- Ex-post principles-based prohibitions relating to conduct and structure
- Efficiency matters considered as part of authorisation by the Commerce Commission (the courts can also look at these matters on appeal in authorisation cases)
- Clearance available on a voluntary basis to provide business certainty

- Sanctions to deter anticompetitive conduct.

To deter anticompetitive conduct, the Commission is equipped with tools to detect and sanction these types of behaviour, such as:

- preventing the establishment or operation of business arrangements which substantially lessen competition
- preventing firms with substantial market power from abusing that power
- providing scrutiny of the competitive effects of mergers or takeovers to prevent undesirable aggregation of market power.

Regulating for outcomes consistent with competition

While we generally rely on market mechanisms (i.e. the process of competition) to promote the long-term benefit of consumers, **non-market mechanisms** may be warranted in certain circumstances where there is limited or no competition, to reduce barriers that may impede competition or otherwise limit consumer benefits.

In certain markets with natural monopoly characteristics, such as airports, electricity lines, and gas pipelines, economic regulation is deemed necessary to promote the long-term benefit of consumers (see Part 4 of the Commerce Act).

These tools include:

- Implementing regulatory control where competition is insufficient to promote the long-term interests of consumers (e.g. electricity lines, gas pipelines)
- Performance monitoring and reporting on specific markets (e.g. airports, telecommunications, dairy)
- General inquiry powers for other sectors (Part 4 inquiries).

Our approach to economic regulation is to provide for a set of regulatory instruments with which the Commission can regulate the supply of certain goods or services in markets with little or no competition. We do not have a generic access regime for regulated suppliers. Industry-specific regimes can be tailored to reflect the different structures, market arrangements and historical regulatory experience of each sector. These regulatory instruments are:

- information disclosure regulation – a relatively ‘light-handed’ type of regulation which enables interested parties to assess whether the business is promoting the long-term benefit of consumers
- negotiate/arbitrate regulation – this requires suppliers and customers to negotiate a settlement on matters such as prices and quality, otherwise be subject to arbitration
- default/customised price-quality regulation – this provides for a relatively low-cost form of price-quality control for suppliers of regulated goods or services
- individual price-quality regulation – this gives the Commission the discretion to set price-quality paths as it sees appropriate for a specific regulated supplier.

Promoting competition

Competition policy supports the regulatory levers in the Commerce Act described above. The concept of ‘promoting competition’ through competition policy does not fit solely within the scope of the competition system. This work is also undertaken by other government agencies who have an interest in promoting competition as greater competition can contribute to higher economic productivity and growth. The Regulatory Impact Analysis (RIA) requirements, for example, require competition assessments as part of problem definition and impact analysis. Testing these assessments with agencies and the public as part of consultation is key for these assessments to inform policy advice. This includes raising awareness of the benefits of competition, and identifying opportunities to minimise barriers to competition by reviewing occupational regulation with the aim of removing anticompetitive entry barriers and conduct regulation.

The competition enforcement activities under the Commerce Act are generally focused on *protecting* competition, but the Commerce Commission has a broader mandate to promote competition, as set out in the Letter of Expectations for 2017/18 and in chapter 3 of the charter. The Government has recently agreed to provide a market studies power for the Commission, which will also better enable *promoting* competition.

There is further opportunity to promote competition through open trade and investment policies (including international trade agreements), and best practice public procurement of goods and services and in the government’s provision of public services (including ownership of public assets).

Consumer protection measures can also be an important driver in promoting competition from the demand side. For example, consumers who are aware of their rights under consumer legislation can demand products of good quality and price. Informed consumers can promote competition in markets by exercising choice. This is set out in more detail in the *Consumer and Commercial Charter*.

Scope of the system

What is covered by the competition system?

The Commerce Act 1986 forms the backbone of the competition system and is the primary legislation for New Zealand’s competition law. New Zealand’s competition law is comprehensive, and extends to all goods and services supplied or acquired in trade in markets in New Zealand, unless specifically exempt. This includes:

- anyone carrying out an activity in trade (e.g. individuals, businesses, local authorities)
- specified participants in identified markets (these are regulated businesses under Part 4 of the Commerce Act: major international airports, electricity distribution and transmission businesses, gas pipeline businesses)
- the Crown to the extent it engages in trade (e.g. government-owned businesses)
- end-users or consumers also participate in the system as they are the parties that businesses are ultimately competing for.

The Commerce Act has extraterritorial application in specific circumstances:

- Conduct outside New Zealand by a New Zealand resident, or any person carrying on business in New Zealand, is also subject to the Act if that conduct affects a New Zealand market.

How the competition system interacts with other regulatory systems

The competition system also influences the operation of other regulatory systems due to the wide-ranging impact of competition policy. The broad role of MBIE to promote competition in markets means that the Competition and Consumer Policy team often advocates for the inclusion of competition objectives into policy projects led by other teams within MBIE and across government.

While the core competition policy framework is provided by the Commerce Act, there is also a range of other legislation and regulations which can impact on the level of competition in the New Zealand economy. It is important to ensure that this wider regulation that falls outside the competition system does not harm the long-term interests of consumers.

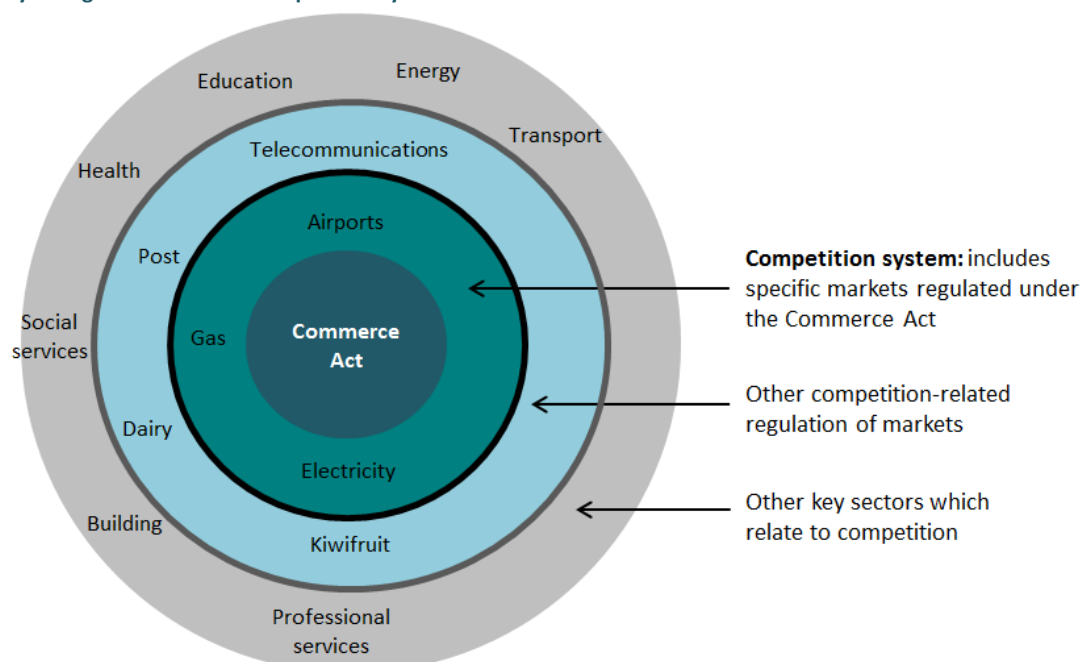
In certain markets where there is little or no competition, the price and quality of goods and services may be subject to additional oversight to benefit consumers.

To the extent that these markets are regulated by the Commerce Act, they will be included in the competition system (see diagram below).

Other markets which are regulated to promote competitive outcomes also have strong linkages to the competition system, but are not considered part of the competition system for the purposes of this charter.

With regard to sectors such as electricity and gas, the Commerce Commission is responsible for generic ex-post competition law and economic regulation of monopoly assets. The sector-specific regulator (e.g. the Electricity Authority and the Gas Industry Company) is responsible for technical regulation and ex-ante measures to promote competition, including the monitoring of competition.

Key linkages between the competition system and other sectors



Electricity and gas

The competition and energy regulatory systems share objectives with regard to promoting competition. Within the electricity and gas markets, suppliers of electricity lines and gas pipeline services are regulated under Part 4 of the Commerce Act because they are considered to be natural monopoly services. The Commerce Commission regulates the transmission and distribution in the supply of electricity and gas (i.e. regulated businesses must disclose certain performance information, and the revenues they can earn and their quality standards are regulated).²

The electricity and gas wholesale and retail markets are also regulated under sector-specific legislation to support broader policy objectives, such as reliability, safety, and efficiency.³ These sector-specific legislative regimes go beyond the Commerce Act and are not considered part of the competition system, but there may be overlapping regulatory functions and competing objectives that regulatory actors from both systems need to actively manage, i.e. promoting incentives for investment, vs. promoting energy efficiency.

The Electricity Authority (EA) is the electricity sector-specific regulator under the Electricity Industry Act 2010, and also has an objective to promote competition in the sector. The Gas Industry Company (GIC) is the co-regulatory industry body under the Gas Act 1992, and makes recommendation on gas governance regulations to improve the operation of gas markets, infrastructure and consumer outcomes.

The EA and GIC each have a memorandum of understanding (MOU) with the Commerce Commission,⁴ setting out how they will work with each other on matters of common interest where there may be scope for uncertainties (i.e. both the Commission and EA have a legislative mandate to promote competition). While the MOUs govern these bilateral relationships, the Council of Energy Regulators (CER) provides an additional forum in which common issues can be discussed and, if necessary, managed on a multi-agency basis. For example, the Energy Regulatory System Charter has been developed through this forum.

Telecommunications and postal services

Telecommunications infrastructure and postal services ('the communications market') also have strong connections to the competition system. While competition is an important dimension of the regulatory system for the communications market,⁵ this largely falls outside the scope of the competition system (this will be covered by the *Communications Charter*).

Sector-specific legislation in this area includes the Telecommunications Act 2001, which regulates the supply of telecommunications services in New Zealand, and the Postal Services Act 1998, which opened up the postal market to full competition. The Telecommunications Act was reviewed by

² Some electricity distribution businesses are exempt from price-quality regulation if they meet certain consumer-ownership criteria in Part 4.

³ The full regulatory framework for the energy system is set out in the Energy Regulatory System Charter.

⁴ MBIE also has MOUs with the EA and the Energy Efficiency and Conservation Authority (EECA).

⁵ The Commerce Act is still the primary legislation for dealing with retail markets and markets for telecommunications content. The new amendments to the Telecommunications Act will allow the Commission to monitor retail markets and dispute resolution regimes.

MBIE's Communications Policy team from 2015-2017. The Communications Policy team focuses on competition matters in the communications market, as competition is a core element in the relevant legislation. The Competition & Consumer Policy team also has an interest in the communications market to the extent that there are competition issues related to the Commerce Act.

Dairy, kiwifruit and other primary sectors

The Ministry for Primary Industries (MPI) has policy responsibility for the dairy and kiwifruit industries, and administers the Dairy Industry Restructuring Act 2001 (DIRA) and Kiwifruit Export Regulations 1999. The way these industries have been structured have enabled greater economies of scale for exports, but also means there is lessened competition in the domestic market. MBIE tries to ensure that competition objectives are taken into consideration and balanced against broader policy objectives when policy proposals relating to these industries are developed.

MBIE provides secondary advice to MPI to ensure that competition objectives are taken into consideration during the development of policy proposals relating to the dairy and kiwifruit industries.

The key objective of the DIRA is to promote efficient operation of dairy markets in New Zealand by ensuring contestability (rather than competition) of these markets. The Commerce Commission has both an enforcement and adjudication role under the DIRA.

Airports and international shipping

Some aspects of the transport sector are governed under the Commerce Act in addition to specific transport laws. The three major international airports, Auckland, Christchurch and Wellington are regulated by information disclosure under Part 4 of the Commerce Act.

There are also several transport areas which overlap with the competition system. In particular, the Civil Aviation Act 1990 and Airport Authorities Act 1966 which are administered by the Ministry of Transport have linkages to airport economic regulation administered by MBIE under Part 4 of the Commerce Act. MBIE also provides secondary advice on policy proposals that may have an impact on competition in the transport sector.

Some aspects of transport regulation have a strong competition dimension (such as the authorisation regime for international civil aviation alliances, which is administered under the Civil Aviation Act) but are held under specific transport law rather than general competition law.

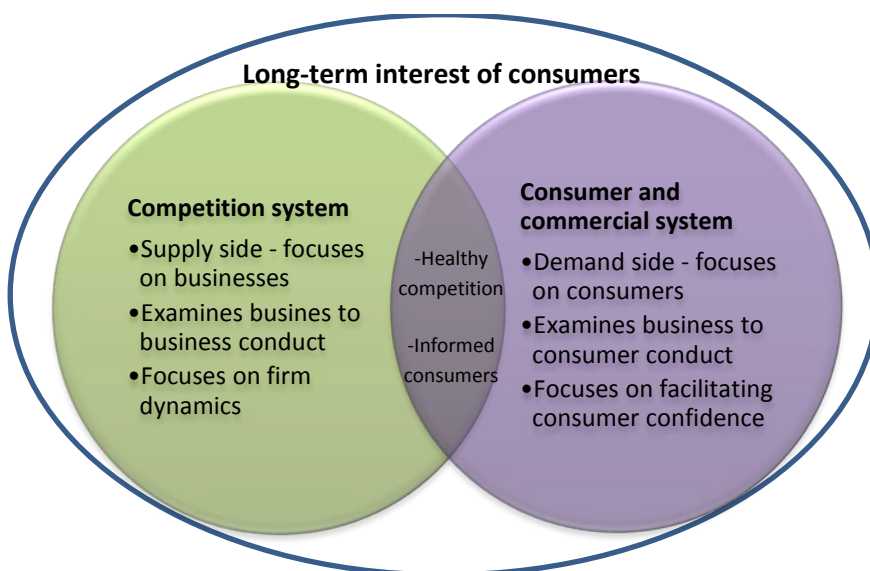
Also, the passing of the Commerce (Cartels and Other Matters) Amendment Act 2017 means that international shipping to and from New Zealand will be subject to competition law with a targeted exception, after a two-year transitional period which ends on 15 August 2019.

As regulatory stewards of the competition system, MBIE needs to ensure that adequate attention is paid to this part of the transport regulatory regime, particularly as thinking on the role of competition in small markets continues to evolve.

How the system works with the consumer and commercial system

The consumer and commercial regulatory system sits alongside the competition system and shares the ultimate goal to promote the long-term interests of consumers in New Zealand, as set out in the diagram below. There are significant linkages between these systems in promoting consumer welfare objectives and each system cannot exist without the other in achieving these outcomes.

Relationship between the two regulatory systems



We recognise the importance of consumer protection and commercial legislation to creating efficient and competitive markets, and ensuring that businesses and consumers can transact with confidence. For example, the provisions of the Fair Trading Act 1986 promote increased market transparency through

prohibiting false and misleading consumer information, unsubstantiated claims, and unfair trading practices.

While the competition system is integral to serving consumer interests, the consumer and commercial system is a complementary support system because market failures can result in imbalances of power which put consumer outcomes at risk.

While the competition system focuses on the processes of competition, and the impact of broader business environment, the consumer and commercial system also helps to drive competition among businesses to meet consumer interests by regulating the interactions between businesses and consumers. It does this by providing key consumer protections and business obligations, and also provides a framework for interactions between private individuals and businesses.

International linkages

New Zealand has a special relationship with Australia under the Closer Economic Relations (CER) Agreement. One of the main objectives of the CER was to develop trade between New Zealand and Australia under conditions of fair competition.

For example, while the MOU between the two governments on the Coordination of Business Law expired in September 2015, many of the arrangements set up under that MOU are enduring. These include:

- legislative provisions enabling the ACCC and Commerce Commission to share confidential information for enforcement purposes
- cross-membership between the ACCC and Commerce Commission at associate member level
- New Zealand drawing on the pool of members (current and past) of the Australian Competition Tribunal to be lay members of the New Zealand High Court
- consultation between policy agencies on competition law reform proposals that may impact on the single economic market.

Australia and New Zealand have also harmonised our competition laws by agreeing to extend the prohibitions on the use of market power to the 'trans-Tasman market' in section 36A of the Commerce Act in New Zealand and section 46A of the Competition and Consumer Act 2010 in Australia.

New Zealand is also signed up to a number of other FTAs which are intended to help New Zealand businesses become and remain more competitive in overseas markets. Many of these international agreements have specific competition policy chapters to provide for a principles-based approach to the development and enforcement of competition policies between the parties.

Broadly, this requires New Zealand to maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and to take appropriate action with respect to that conduct. This often provides for a mechanism for parties to consult on competition issues and encourages cooperation through, for example, information exchange.

The Commerce Commission also has cooperation agreements and arrangements⁶ in place with a number of overseas competition authorities, notably with Australia, Canada, and Taiwan. These cover matters of common interest, including coordination of enforcement activities, and investigative assistance.

MBIE also engages with international competition and economic regulation community on a range of issues of mutual interest. We have a substantial interest in the work of the OECD Competition Committee, and we are also looking to lift our level of engagement with our overseas counterparts on areas of common interest.

⁶ There are two main types of cooperation mechanisms: cooperation agreements and arrangements. Some cooperation arrangements (i.e. *Co-operation Arrangement between the NZCC and the ACCC in relation to the provision of compulsorily-acquired information and investigative assistance*) have statutory backing and allow for a higher level of cooperation.

3 Roles and responsibilities

One of the key purposes of this charter is to set out how system actors currently work together to address the gaps, overlaps and uncertainties in the system, and ensure that any changes made within the system contribute to desired outcomes for the system as a whole. It is also an opportunity to set and agree expectations for how system actors should work together and for what purposes.

System actors work together and with actors in other regulatory systems in the ways described in *Annex 1*. The description of these in the charter is designed to support the active management of the system by:

- Enabling actors to identify who to talk to or who is responsible when an issue needs addressing at a particular point in the system
- Ensuring a coordinated response to issues
- Enabling actors to identify who may have data or other intelligence on an issue.

Regulatory actors in the competition system

Regulatory actors are responsible for regulating the system and are directly accountable to the Minister of Commerce and Consumer Affairs. These actors are located within the Commerce Commission and MBIE.

Ministry of Business, Innovation and Employment

As regulatory stewards of the competition system, MBIE has primary responsibility across the system for maintaining, monitoring, evaluating and improving it.

MBIE's **Competition and Consumer Policy team** has shared responsibility of the competition system along with the Commerce Commission. It is also responsible for administering the Commerce Act and advising the Minister of Commerce and Consumer Affairs on competition and economic regulation policy issues (See **Annex 1** which provides a detailed list of MBIE's roles). This includes

- advising on, monitoring and reviewing competition law
- administering Part 4 levies
- being the strategic adviser to the responsible Minister on the Commerce Commission
- representing New Zealand on competition policy issues in international fora
- providing expert competition advice to inform wider government policy and regulation development.

MBIE seeks advice from the Commission on technical matters, such as the application of the Commerce Act, and consults the Commission during the policy development process and on emerging issues and trends that may have implications for the Commission.

As part of its stewardship obligations, MBIE has a primary responsibility to keep system actors informed of developments in the system, identify emerging risks and opportunities, and manage any risks or gaps. MBIE will also proactively seek information from other system actors on matters that may affect the competition system.

Commerce Commission

The Commerce Commission is an independent Crown entity established under the Commerce Act. It is the authority in New Zealand that administers and enforces the Commerce Act. The Commission is responsible for promoting competition, protecting consumers, and regulating specified markets in which competition is limited.

The Commerce Commission is primarily responsible for operational policy and enforcement. It does not provide policy advice but the Commission submits on policy reviews that have an impact on competition law and enforcement. In addition to monthly meetings between MBIE and the Commission to discuss matters of mutual interest, MBIE and the Commission engage on an informal basis to keep each other informed as issues arise.

In specific sectors such as telecommunications and dairy, the Commerce Commission has both enforcement and regulatory control roles (e.g. the Telecommunications Act and DIRA).

The Commission has a number of MOUs with other entities (the Electricity Authority, the Gas Industry Company, the Financial Markets Authority and the Department of Internal Affairs) which it shares responsibilities with. These MOUs explain how the entities intend to coordinate their respective statutory roles in relation to competition enforcement and economic regulation.

Other key participants that interface with the competition system

Other actors also participate in the system but are not necessarily considered core ‘regulatory actors’ in the competition system. These actors perform functions which contribute and are often essential to the effective operation of the system, such as by providing advice and education, or dispute resolution services.

They may participate in the system by inputting into the primary functions of the core regulatory actors, or performing functions which are delegated and/or funded by core regulatory actors, and which core regulatory actors remain accountable for.

There is further opportunity to strengthen relationships between system actors so that agencies are more proactive in engaging with each other on emerging issues and priorities, for example through regular catch ups and updates on work programmes and priorities.

Ministry of Business, Innovation and Employment

- MBIE’s **Energy Markets Policy team** leads departmental advice on energy policy and competition-related energy issues. They also monitor energy policy and the performance of Crown entities (i.e. Electricity Authority, Energy Efficiency and Conservation Authority).

Regarding areas of overlap, such as policy issues on electricity and gas under Part 4 of the Commerce Act, the policy leads on these workstreams meet together on a regular basis to catch up on current issues. They also consult each other regularly on current work programmes and collaborate on briefings and reports that have a competition dimension, e.g. emerging issues for energy markets.

- MBIE's **Communications Policy team** leads departmental advice on communications policy issues and manages the Telecommunications Act 2001. The team inputs into the expectations of the Commerce Commission and monitors the telecommunications function of the Commerce Commission. The Competition and Consumer team continues to collaborate with Communications Policy on matters of mutual interest, i.e. advising on the competition impacts of policy proposals, through informal engagement as well as staff secondments during major policy reviews.
- MBIE's **Strategic Policy team** collects and uses data and information to assist in their research on economic growth, of which competition is a current priority. It has worked with the Competition and Consumer Policy team to develop a competition research agenda to systematically measure competition and identify areas requiring greater analysis.

The Treasury

The Treasury is responsible for the strategic coordination of the Government's entire regulatory management system. The Regulatory Quality Team within the Treasury exercises stewardship over the regulatory management system to maintain and enhance the quality of government-initiated regulation.

As part of this oversight role, MBIE often works with Treasury to encourage other agencies to take into account competition objectives when developing and analysing policy options in their respective areas. This includes assisting other agencies in the assessment of competition impacts of a policy proposal, and inputting joint departmental comments into Cabinet papers where necessary. MBIE has a monthly catch up with Treasury to identify emerging issues or proposals across government that may have an impact on competition, and discuss current priorities and issues of mutual interest.

Ministry of Transport

The Ministry of Transport (MoT) is responsible for leading transport sector-specific policy advice. The Competition and Consumer team collaborates with MoT where there are policy issues that impact on both the general competition regime and sector-specific regulation, e.g. international shipping and civil aviation. MBIE engages with MoT on an ad-hoc basis, depending on the current issues before each agency.

Ministry for Primary Industries

The Ministry for Primary Industries (MPI) is the lead agency for dairy and horticulture regulation. It is responsible for administering the Dairy Industry Restructuring Act 2001. MPI consults MBIE on new

policy proposals affecting the dairy and kiwifruit industries, and frequently engages with MBIE. MBIE provides secondary advice on competition aspects of MPI's policy proposals, sometimes in conjunction with the Treasury. MBIE engages with MPI on a regular basis to discuss current and emerging issues in these areas.

The Productivity Commission

The Productivity Commission is a participant that sits outside the competition system but has a strong interest in policy changes to improve competition. It is an independent Crown entity established to provide advice on to the government on improving productivity in a way that supports the overall wellbeing of New Zealanders. The Productivity Commission does this through undertaking inquiries assigned to it by referring Ministers and self-initiated research into productivity-related matters.

MBIE works with the Productivity Commission through the Productivity Hub on research matters of common interest (including competition research) and considers its advice and recommendations following inquiries (such as *the Boosting services sector productivity* report in 2014 which recommended the introduction of a market studies power for the Commerce Commission).

The courts

While the courts are not considered actors with responsibilities specific to the competition system, and their jurisdiction goes far beyond competition law, the courts play a key role in making determinations on aspects of competition law.

The High Court has jurisdiction over a range of matters under the Commerce Act as set out in section 75 of the Commerce Act. This includes hearing appeals against determinations of the Commission, appeals against input methodologies set by the Commission, and matters in the case of contraventions of the Act.

4 Monitoring and evaluation

Monitoring and evaluation is a function of the wider policy cycle. Periodic consideration of New Zealand's competition laws and institutions is necessary to maintain their effectiveness. There are two main parts to the monitoring and evaluation activities under the competition system: the policy function and the enforcement function.

Evaluation is essential to effective government and governance in exercising MBIE's stewardship role over regulatory regimes, to monitor, and thoroughly assess at appropriate intervals, the performance and condition of their regulatory regimes to ensure they are fit for purpose, and to act on problems and opportunities for improvement in the design and operation of those regimes.

How do we assess whether the competition system is achieving its objectives?

There are two strands to this in the competition system which are closely intertwined. MBIE does this by monitoring the Commerce Commission's competition enforcement actions and activities to promote competition, and assessing whether our competition laws and policies are achieving good outcomes for New Zealand. In this context, 'monitoring' can mean MBIE's formal responsibilities for monitoring the performance of the Commerce Commission as well as environmental scanning of competition issues.

MBIE liaises regularly with the Commission to gather data for the purposes of monitoring the competition system. This includes working together to identify and manage emerging issues in the system, as well as to provide feedback on the Commission's accountability documents and performance measures.

Competition issues and outcomes for New Zealand

Ultimately, competition policy should be justified by its beneficial effects on the economy and on consumers' welfare (for example, its effects on growth, innovation, and employment).

There are several ways in which evidence and/or data is gathered for monitoring and evaluation purposes:

Activity	Who
Stakeholder engagement and complaints data	Commerce Commission; MBIE Competition & Consumer Policy
Environmental scanning	MBIE
Identifying barriers to competition and when to provide advice	MBIE Competition & Consumer Policy
MBIE's research agenda and programme	MBIE Competition & Consumer Policy; Research & Evaluation; the Productivity Hub

Commerce Commission's competition enforcement activities

The Commerce Commission is an independent Crown entity accountable to the Minister of Commerce and Consumer Affairs for its performance. Its independence allows it to be an impartial promoter and enforcer of the law.

The Commission delivers its outputs under an annual **Statement of Performance Expectations (SPE)** with the Minister of Commerce and Consumer Affairs and the Minister for Communications. The SPE accompanies the **Statement of Intent (SOI)**. It is intended to promote accountability to the public by detailing the Commission's outputs, prospective financial statements and how it will access its performance against its strategic objectives.

The Commission's work is primarily funded through eight appropriations from Vote Business, Science and Innovation.

MBIE has a key role in monitoring the performance of the Commission in accordance with the **Crown Entities Act 2003**.

Activity	Who	Comment
Monitoring performance against Statements of Intent	MBIE	The Commission produces a statement of intent (SOI) at least every three years setting out its work programme for the following four financial years. The current SOI runs from 2017-2022. MBIE is currently reviewing the performance measures used by the Commission.
Annual Reports and Statement of Performance Expectations	MBIE Commerce Commission	The Commission produces a statement of performance expectations (SPE) annually outlining its priorities, forecast financial statements, and performance measures for the next financial year. The Commission reports against the SOI and SPE every three months to the government via MBIE, and annually to the government and public of New Zealand via the Annual Report . The Commission subject to an annual audit by the Office of the Auditor-General and an annual financial review before the relevant Parliamentary Select Committee.
Monitoring of Commission decisions and investigations	MBIE	The Commission is accountable to the courts (and in some cases, the Office of the Ombudsman) for the exercise of its statutory powers. MBIE monitors Commission determinations and relevant court judgements. MBIE also monitors overseas regulatory developments and decisions but the way we do this could be

		improved.
Evaluation of enforcement decisions	Commerce Commission	The Commission tests key hypotheses and predictions. It does not undertake full ex-post evaluations of individual decisions, but rather examines whether anticipated market developments that were key to a number of its decisions did take place as predicted, or not.
Legislative reviews and evaluations	MBIE	There is no programmed legislative review under the Commerce Act but MBIE conducts targeted reviews where specific issues within the Act have been identified.

Commitments to ongoing monitoring and evaluation

There are difficulties in evaluating quality factors in competition outcomes. Competition is a concept that is easily understood but is difficult to quantify or measure directly. A more systematic approach to reviewing competition enforcement decisions may help to improve future decision making and data, e.g. periodic ex-post reviews of enforcement decisions.

MBIE is currently examining how to improve our identification of markets with low competition and more systematically measure competition outcomes.

One of the difficulties we have identified in measuring competition is the lack of access to accurate, current and complete data. This limits our ability to carry out confident and objective estimations of the levels of competition across markets. A full competition system assessment only occurs every 7-8 years, therefore it is important to have regular monitoring of competition policies and ongoing environmental scanning.

There is still room for improvement in terms of developing a systematic approach towards monitoring, identifying issues and opportunities to promote competition, and evaluation in particular. MBIE will continue to work with partners in the competition system to identify issues and opportunities to improve our monitoring and evaluation activities.

Regular (i.e. biannual or annual) meetings with relevant agencies (e.g. MBIE, Commerce Commission, Productivity Commission, Ministry for Primary Industries, Ministry of Transport, Ministry of Health, Financial Markets Authority, Electricity Authority, The Treasury and Reserve Bank) have been suggested as a forum to support MBIE's regulatory stewardship responsibilities for the competition system. We will explore how such a forum could be implemented to provide for high-level collaboration and information sharing and address systematic issues as they arise.

Annex 1: Functions of system actors and participants

System actors and other participants that interact with the system perform functions which are essential for the competition system to operate effectively. The core actors responsible for each function, how they operate, and how they relate, are listed below.

Policy advice	Competition and Consumer Policy (MBIE) [Lead actor]	• Administers the Commerce Act and regulations • Provides policy advice to the Minister of Commerce and Consumer Affairs to proactively shape the agenda for the system, as well as develop policy responses to Ministers' thinking • Primary responsibility for developing, reviewing and amending competition law and other regulatory settings which shape business behaviour • Provides secondary advice to policies administered by other parts of MBIE and government agencies where a competition perspective is relevant (e.g. occupational regulation)
	Commerce Commission	• Provides secondary advice and intelligence to MBIE policy development to ensure competition policy and regulatory structures are fit-for-purpose
	Sector-specific policy teams within MBIE	• Provide policy advice on sector-specific policy⁷ • The Competition and Consumer Policy team has an interest in the competition implications of sector policy developed by other parts of MBIE • Administer sector-specific legislation which have competition objectives or effects, including the: - Telecommunications Act (Communications Policy) - Postal Services Act (Communications Policy) - Electricity Industry Act (Energy Markets Policy) - Electricity Act (Energy Markets Policy) - Gas Act (Energy Markets Policy)
	Sector-specific policy teams across government	• Provide policy advice on sector-specific policy⁸ • Administer sector-specific legislation which have competition objectives or effects, including the: - Dairy Industry Restructuring Act (MPI) - Kiwifruit Export Regulations (MPI) - Civil Aviation Act (MoT) - Airport Authorities Act (MoT)
	Treasury	• Provides secondary policy advice through the competition roles

⁷ These teams sit outside the charter but are included in this table because their policy decisions can impact on the long-term interests of consumers.

⁸ These teams also sit outside the charter but are included in this table because their policy decisions may impact on the long-term interests of consumers.

		within the Treasury and quality assurance process of the Regulatory Impact Analysis Responsible for oversight of the Government's regulatory management system
Operational policy	Commerce Commission [Lead actor]	- Responsible for operational policy to give effect to high-level policy (i.e. processes of applying the Commerce Act) Competition enforcement functions - Sets its own operational policy and priorities in relation to enforcement and regulatory control activities under the Commerce Act - Develops frameworks and methodologies for determining whether to open an investigation, and what enforcement actions to take at the end of an investigation Regulatory functions - Sets and reviews the input methodologies (IMs) for regulated businesses under Part 4 of the Commerce Act in advance of the application of economic regulation - Sets information disclosure requirements and price-quality paths under Part 4 (including customised price-quality paths) for specified businesses
	MBIE	- Ensures policy intent is carried through into Commerce Commission's service delivery, and operational experience informs future policy development - Works with the Commission to implement new regulation, improve delivery of existing services and coordinate the whole competition system - Responsible for Crown entity monitoring of the Commerce Commission (board appointments, accountability documents, funding, etc.) - Administers the Commerce (Levy on Suppliers of Regulated Goods and Services) Regulations 2009
Advice, education and information	Commerce Commission [Lead actor]	- Provides information and guidance on the Commerce Act (i.e. purpose and provisions, and how it applies to businesses) - Publishes an annual Consumer Issues report - Publishes investigation reports that are of general interest - Makes available information about the carrying out of functions and exercise of powers by the Commission - Educates businesses and consumers on their rights and obligations, and responds to queries about these matters - Gathers information from consumers, businesses and market surveillance to aid investigations into behaviour that appears to breach the Commerce Act - Participates in international fora to share information on New Zealand competition law and practice
	Competition and Consumer Policy (MBIE)	Provides information and advice in response to queries from individuals and businesses who contact the Ministry or the Minister of Commerce and Consumer Affairs on competition issues (i.e. Ministerials)

		Assists the Commission to get the right information at the right time to Ministers (e.g. Reports on the state of competition in the dairy industry; summary and analysis reports on the information disclosed by regulated businesses)
Compliance and enforcement	Commerce Commission [Lead actor]	<i>Competition enforcement functions</i> - Investigates alleged breaches of the Commerce Act - May provide investigative assistance to overseas competition authorities with whom it has agreements - Takes a range of enforcement actions (i.e. litigation) against businesses and individuals that breach the Commerce Act - Grants or refuses merger clearances - Can authorise potentially anticompetitive conduct on a public benefit test, including mergers and acquisitions - Monitor and investigate cartel behaviour and takes legal action if necessary - Investigates cases of anticompetitive unilateral conduct - Can take proceedings in the High Court for civil remedies or penalties to enforce the Act <i>Economic regulation functions</i> - Enforces price-quality paths for regulated businesses under Part 4 of the Commerce Act - Requires regulated businesses to disclose information about their financial performance or other aspects of business
	The courts	- Not a regulatory actor, but plays an important role in the enforcement of the Commerce Act - Can apply civil remedies or penalties to enforce the Commerce Act
Monitoring and evaluation	Competition and Consumer Policy (MBIE) [Lead actor]	- Undertakes environmental scanning and ongoing stakeholder engagement to identify potential competition issues and monitor overseas trends - Initiate research into areas of weak competition in the economy - Undertakes targeted reviews of the Commerce Act where potential issues have been raised - Undertakes programmed reviews of discrete pieces of legislation within the competition system - Monitors the performance of the Commerce Commission in accordance with the Crown Entities Act to ensure it is meeting its promoting competition objectives - Identify and understand consumer issues through the National Consumer Survey (which is produced by Consumer Protection) - Undertakes funding reviews of the Commerce Commission's areas of activity
	Evidence, Monitoring and Governance branch (MBIE)	- Assists policy team in developing the ongoing competition research agenda - Assists in the monitoring of the Commerce Commission's performance and funding allocation
	Commerce Commission	Raises awareness of competition issues, risks and priorities through mechanisms such as the Consumer Issues Report,

		competition reports to Ministers, summary and analysis reports on regulated businesses, and reports on various investigations undertaken into particular sectors, markets or issues • Conducts inquiries under Part 4 of the Commerce Act in whether particular goods or services should be regulated or controlled, and makes recommendations to the Minister • Its key outputs are determinations, public reports and advice to officials, compliance and enforcement • Ability to carry out summary and analysis reports allows the Commission to evaluate decisions • Feedback to MBIE by providing assessment of the effectiveness of the current regime they are responsible for applying • Responsible for sector-specific monitoring activities under the Telecommunications Act and DIRA (e.g. Fonterra's base milk price)⁹
	The Treasury	• Oversight of Cabinet's Regulatory Impact Analysis requirements which include providing quality assurance of the Regulatory Impact Analysis for significant regulatory proposals • Assists MBIE in monitoring the performance of the competition system and any associated reviews
Dispute resolution	The courts [Lead actor]	• Tests the powers of the Commission to clarify the law • Hears appeals on Commission determinations under the Commerce Act, e.g. merger applications • Hears appeals on investigations under the Commerce Act • The High Court can provide judicial guidance on issues of law if the Commission makes an application (s100A Commerce Act) • Can hear private actions for damages or other civil remedies for breaches of the Act • The IMs are subject to appeal to the High Court. The High Court can amend the IMs, revoke the IMs and substitute a new one, or refer the determination back to the Commission • Customised price-quality paths are subject to merits review by the High Court • The High Court's decision-making exercise is limited by the terms of the Act and other applicable principles
	Commerce Commission	• Not a dispute resolution service, but has enforcement and adjudication roles under the Dairy Industry Restructuring Act.¹⁰

⁹ This falls outside the charter but MBIE has a role in advising the Minister of Commerce and Consumer Affairs on these activities.

¹⁰ This is also outside the scope of the charter but illustrates that the Commission also has a role in dispute resolution in specific circumstances.