

Civil Contractors New Zealand submission on the Commerce (Promoting Competition and Other Matters) Amendment Bill

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About Civil Contractors New Zealand

Civil Contractors New Zealand is an industry association representing the interests of more than 500 contractor organisations, including large, medium, and small businesses in civil engineering, construction, and general contracting. We also have more than 300 associate members who provide products, support, and services to contractor members.

Our members build and maintain horizontal infrastructure such as roads, bridges, tunnels, dams and power stations, water networks, telecommunications cables and electricity lines, sport and recreation facilities, national defence facilities ports and airports.

These are services a modern and developed economy must have to compete efficiently in world markets and to deliver high living standards for all New Zealanders.

CCNZ has a national office and 12 branches covering the length and breadth of New Zealand. Our members undertake \$10 to \$12b in projects each year and keep about 60,000 people employed.

Introduction

Civil contractors literally shape the earth around us. They play a critically important role in shaping the health, wealth and wellbeing of our communities and our environment. In the recent severe weather events, civil contractors became first responders, mobilising as soon as the storms hit to save lives, protect property, and stabilise affected land and infrastructure.

CCNZ and its members support healthy competition in the market, but also positive collaboration between businesses working together in the civil construction industry. Our members often have relationships as head contractor, subcontractor and specialist infrastructure constructor.

Commercial relationships between members are codified through terms of construction contract, and members sometimes collaborate through early contractor involvement arrangements with clients, joint ventures, panels and formal alliance projects.

Recommendation

CCNZ is supportive of the intent behind the Commerce (Promoting Competition and Other Matters) Amendment Bill. However, there are several issues that should be explored in more detail and carefully reviewed before this legislation comes into force, lest there be unintended consequences that negatively impact on competition or collaboration.

Executive Summary

1. CCNZ supports moves to remove anti-competitive behaviour but is concerned the proposals may jeopardise or adversely impact existing models that support collaborative working arrangements in construction, for instance joint ventures, alliances, panels, early supplier engagement and potentially even prequalified subcontracting.

If the legislation proceeds as proposed, CCNZ recommends the Commerce Commission to make early/immediate class exemptions, to support legitimate models where competitors can work collaboratively.

2. CCNZ is concerned the wording "creating, strengthening or entrenching a substantial degree of power in the market" is applied too broadly. In Australia, this only relates to business acquisitions, whereas in the NZ proposal, it is intended to apply to all Commerce Act prohibitions. This is too broad and will most likely stifle competition.
3. CCNZ is concerned that the introduction of Clause 5 of the Bill opens up potential unintended consequences that may impact, disrupt or impose additional compliance and reporting requirements on existing collaborative working arrangements.
4. CCNZ supports efforts to combat predatory pricing. However, is concerned that the tools proposed to control this based on pricing alone do not acknowledge charitable works or the role clients and procurement play in setting market pricing for the civil construction industry
5. We recommend close attention is paid to supporting and maintaining existing forms of collaboration between competitors, including joint ventures, early supplier/contractor engagement, alliances and panels. These models are functional and care should be taken not to disrupt them with unintended consequences.

Detailed feedback

Support for a competitive and collaborative market

We support moves to remove anti-competitive behaviour.

We are concerned that clause 5 of the Bill may open New Zealand up to unintended consequences regarding previous joint ventures, panels and collaborative arrangements that were fine, and may now be perceived as countering the Commerce Act.

It will likely come down to how the Commission will interpret any "substantially lessening competition" in the market in the context of clause 5.

If the changes are implemented, we would expect to see the Commission use its power to grant class exemptions (*see new section 65R*) proactively, to exempt classes of collaborative conduct in civil construction, including joint ventures, panels and alliances.

Streamlining compliance and reviewing scope of reform

In establishing new processes, CCNZ encourages the Commission to avoid creating unnecessary or arduous regulatory burden. When such a legislative review is undertaken, we should be looking across the Tasman at what is happening in Australia.

In Australia, conduct "creating, strengthening or entrenching a substantial degree of power in the market" only relates to business acquisitions, whereas in New Zealand it is intended to apply to all Commerce Act prohibitions. This is too broad and will most likely stifle competition.

Too often, one of the unintended consequences of New Zealand legislative reform is to disadvantage New Zealand businesses compared to our Australian cousins. That often leads to New Zealand businesses relocating across the Tasman, denying New Zealand consumers of choice.

Positive collaboration

There are well-established practices in our industry where collaboration with competitors results in positive project outcomes.

Structures such as joint ventures, alliances and panels offer the opportunity to bring complementary skills and expertise, specialist equipment, and strong business practices together which can benefit the project outcome in many ways – economically, socially, environmentally, culturally. Contractors are also able to work together and inform clients through use of early contractor involvement.

These are well used structures that are embedded in (particularly) large infrastructure projects in New Zealand, while at the smaller end of the market, businesses may be competing for work on one project and working side by side on another.

The Bill suggests that pro-competitive collaboration is supported and sets out a mechanism for granting exemptions to enable pro-competitive collaboration. We would expect that in the case of these collaborative business models, the Commission will grant class exemptions under clause 65R rather than require an application for exemption each time it is used.

Predatory pricing

CCNZ supports action to mitigate predatory pricing, but urges caution in using blunt enforcement tools to do this. The Commission needs to be careful about unintended consequences. Introducing objective cost-based tests could lead to businesses being reluctant to offer discounts or lower prices – this would not be good for New Zealand consumers.

Another example relates to working at or below cost to deliver community good, for instance, a company maintaining local walking tracks at or below cost for a local community group, when this might not be delivered otherwise. This activity may be recognised as a form of sponsorship or charity, but it is not clear if this would be captured or be required to undergo more extensive reporting requirements under the cost models suggested in the proposed Clause 36c.

In addition, the Commission needs to be mindful of the role that procurement practices play in determining the prices eventually paid for contracts. Over the past 18 months the civil infrastructure construction industry has suffered from a serious lack of project work being brought to market.

Pricing behaviour can be client-driven, and in cases where there is a lack of work, this can drive a 'race to the bottom' in unsustainable pricing. In many recent cases, projects have been tendered below cost just to keep teams busy and equipment in-use, rather than lay them off. There are examples where clients have exploited this market situation, using it to force prices down. Anecdotally we have heard of cases where clients may not tender above a certain amount, despite this not allowing margin to deliver the contract.

'Buying work' in this way has an adverse impact on market competition, as not every business is in a position where they can sustain such client driven pricing pressure. Disincentivising poor procurement practices should be part of this legislative review.

Conclusion

Thank you for the opportunity to make this submission. We would be happy to provide any further information if required.

We would also be happy to appear in person to support this submission.

Kind regards,



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Civil Contractors New Zealand Inc.

