# Wellington, we have a problem

### Comment on and response to Ben Hamlin’s paper for CLIPNZ, August 2024.

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In July of 2024, New Zealand’s Commerce Commission blocked the sale of a DJ software business currently registered in New Zealand to a Japanese-based DJ hardware and software company. It worried about implications for competition in the DJ music business.[[1]](#footnote-2)

Vertical integration can have efficiency characteristics: we have known that at least since Fisher Body.

Venture capital backing of technology startups often depends on an exit strategy involving sale to a larger tech company. Those venture capitalists might reasonably shy away from investing in New Zealand in future, because our Commerce Commission tilts at these kinds of windmills.

If there are potential horizontal issues on the software side, despite potential app-based or laptop-based alternatives, is this really a first-order competition issue for New Zealand? Serato’s submission on the statement of unresolved issues pointed out that its 2023 New Zealand sales were comparable to a single day’s revenue for a single large supermarket.[[2]](#footnote-3)

Perhaps there just aren’t more consequential competition issues that the Commission can address.

Meanwhile, in July of 2024:

* Community Pharmacists called for regulation that would block any new pharmacy from being established within set distances of existing pharmacies.[[3]](#footnote-4) In response, Medsafe and Te Whatu Ora pointed to existing rules requiring community pharmacies to hold an Integrated Community Pharmacy Services Agreement before being allowed to dispense funded medicines. Those rules already seem to operate in strongly anticompetitive fashion: the Bargain Chemist in Upper Hutt, which opened in 2022, continues to be unable to secure such an agreement, potentially because another pharmacy is already nearby.[[4]](#footnote-5) In effect, Medsafe and Te Whatu Ora seemed to be telling community pharmacists not to worry too much, because existing regulatory practice already works as a substantial barrier to entry.
* Massey University’s Johanna Thomas-Maude released a working paper from her doctoral thesis work on the experiences of overseas-trained medical doctors.[[5]](#footnote-6) Current licensing requirements seem far from being the most reasonably practicable way of achieving the public health purposes sought by delegation of occupational licensing to a cartel[[6]](#footnote-7) of existing practitioners. Those restrictions particularly affect doctors trained outside of Europe and North America.
* Lucas Rakasz entered into his fifth month of work as Clinical Lead in the Department of Neurosurgery at the Children’s Hospital in Warsaw, Poland. He had been Neurosurgery Spinal Fellow at Queen Elizabeth Hospital in Birmingham, and then Neurosurgeon there, previously. For about two years after his time in Birmingham, he had sought to serve as neurosurgeon at Dunedin Hospital; his references included the President of the British Neurosurgical Society. But New Zealand’s medical cartel denied his entry, and New Zealand’s courts only asked, in 2022, that the cartel reconsider its decision.[[7]](#footnote-8) Under existing rules, the cartel can be asked to show its work in demonstrating whether training is comparable to training in New Zealand. Whether the rules are reasonably necessary for achieving a desirable public purpose is not a consideration. For example, a reasonable stint as neurosurgeon in a credible UK hospital and strong recommendations from the President of the relevant Neurosurgical Society *might* be considered sufficient, even if initial training was not in a directly-comparable system. If health outcomes were the goal, rather than cartel-enforcement. Normally, cartel enforcement is not considered a defensible public purpose.
* MBIE continued work trying to figure out national building standards that might enable easier substitution and recognition of products; even if they are successful, council risk aversion caused by their inclusion under joint-and-several liability will stymie new product entry. No one has considered whether the overall regulatory apparatus is reasonably necessary for achieving the desired public purpose. But it does have substantial effects on competition and cost in building materials supply, with no obvious ongoing test of reasonableness.
* Council zoning rules and land use planning, and the restrictive covenants made consequential by them, have featured regularly in Commerce Commission market studies. Minister Bishop, in July, announced that councils will be required to set mixed-use zoning in areas subject to NPS-UD, and that minor commercial activity will be allowed in cities more generally – a substantial win for competition.[[8]](#footnote-9) But this was luck. It was not an outcome of deliberate competition policy. We have been lucky to have drawn a Minister of Housing that understands the anticompetitive effects of land-use planning. The Commerce Commission has helped in identifying problems in restrictive land use planning. In 2022, the Commission also helpfully encouraged changes to the Spatial Planning Bill that would allow positive outcomes associated with trade competition to be considered in planning and consenting, and prohibiting the rejection of consents based on adverse retail distribution effects.[[9]](#footnote-10) But if a council effected anticompetitive aims through other rationales, no channel for ComCom review or appeal was proposed.

To put it very bluntly, competition policy is unable to deal with the most substantial harms from anticompetitive activity because those activities are outside of the remit of the Commerce Act.

While the Commerce Commission occasionally and laudably points to those issues in market studies and submissions, it has not demonstrated any interest in recommending changes to the Act that would enable it to weigh in on the country’s most substantial harmful anticompetitive regimes. The Minister’s letter of expectations urged the Commission to “Be a brave, efficient and effective regulator.”[[10]](#footnote-11) If addressing first-order harms would require a change in legislation, proposing that change might be helpful.

The Commission instead spends its time thinking about the global market for DJ software.

It also worries about whether the merger of two geographically-separated grocery retailers who do not compete with each other might harm the upstream market in grocery supply and potentially, eventually, through implausible and circuitous channels, harm consumers through reductions in the number of products on offer. Despite the Commission also operating as grocery regulator specifically mandated to watch over relationships between grocery companies and their suppliers.

Ben Hamlin’s paper is *very* timely.[[11]](#footnote-12) The Commission may have run out of first-order and second-order competition issues to address within the scope of the Commerce Act as it stands. Broadening the Act’s scope, so issues causing first-order harms can be addressed, seems warranted.

Hamlin argues that the Crown exception is past-due for review.

The Commerce Act provides broad exemptions for the Crown, particularly in relation to activities that affect commerce but are not considered to be in commerce. For example, public activities in setting fees for licenses, or in decisions as to whether to grant various licenses. At the same time, explicit statutory exceptions can be broad and are not regularly reviewed. The scope of what counts as Crown activity is also poorly defined.

Consider the following kinds of activities undertaken by the Crown, or under Crown authorisation.

Decisions around the granting of liquor licenses, and conditions on such licenses, can have public health benefits but also anticompetitive effects. Nothing tests whether an appropriate balance is drawn between these. Policies, whether explicit or unspoken, seeking to reduce outlet concentration have obvious effects on competition. Bruce Yandle warns of coalitions of bootleggers and Baptists in such cases, where incumbents may tacitly collude with public health campaigners to increase rivals’ costs.[[12]](#footnote-13)

The Department of Conservation grants limited numbers of concessions for berths, rights to sell food, and the like; the process for setting the number of concessions and allocating them can have substantial effects on competition. Are current practices the most reasonably necessary way of effecting the public purpose sought?

Occupational licensing regimes set by statute are often delegated to practitioners in the regulated field. While practitioners’ expertise makes them well-suited to deciding on standards, they have an obvious potential interest in restricting competition, whether to enjoy monetary or non-pecuniary rents. If any balancing of public purposes and anticompetitive effects was considered when regimes were set, no ongoing review seems apparent. And, as seemed obvious in the Rakasz case, there is no appeal channel that might test the regime’s continued fitness for public purpose.

Other standard setting regimes can at least create the impression that industry representatives assisting in standard setting may set standards to exclude international competitors. Industry representatives will be far more informed than regulators but may also have an interest in standards that have anticompetitive effects. Are the resulting standards the most suitable way of achieving the public purpose sought by the regulation? What appeal channels exist for a potential entrant who can demonstrate that their product’s performance is at least as good as those authorised for use in New Zealand?

Competition policy might also worry that anyone wishing to open a new university in New Zealand effectively requires the permission of existing universities. This one may need a bit of explanation.

Any tertiary degree must be authorised by the Committee on University Academic Programmes (CUAP). The Universities New Zealand website helpfully explains how things work. Legislation sets a committee of university Vice Chancellors (operating as Universities New Zealand) to exercise programme approval and accreditation powers held by the New Zealand Qualifications Authority. Universities New Zealand has delegated its powers to CUAP. What is CUAP? “CUAP comprises a representative from each of the universities, a Chair and Deputy Chair appointed by Universities New Zealand, and a student representative.”[[13]](#footnote-14)

I was taught always to look for the enforcement mechanism if I thought I had found a cartel. Mightn’t a reasonable person worry that the government has created a pretty effective cartel enforcement mechanism here that not only can block new entry but also can stymie competition among universities in course offerings? If someone wished to open a new private university, and existing universities used CUAP as a cartel enforcement mechanism, would that potential entrant have any reasonable recourse or path for review? Has this regime already discouraged potential entry, because difficulty in securing competitors’ approval seems likely? Is creating a cartel structure for universities the most reasonable way of achieving the public purpose sought in quality assurance? Is it at all odd that the country’s two existing medical schools jointly commissioned a report suggesting that the government should not establish a third one?[[14]](#footnote-15) In other contexts, Commerce Commission authorisation for that collaborative work might have been expected.

Or consider the 2021 zoning decision in Ashburton in which Council prohibited a new retail development from taking on additional retail tenants. Why? The stated reason was that Ashburton’s town centre “is in a state of decline”; Plan Change 4 sought to protect the town centre.[[15]](#footnote-16) A vibrant town centre can be a reasonable public purpose, but is banning a new and competing retail development from taking on retail tenants the most reasonable way of achieving that purpose? Should we worry that rather than seeking to achieve a public purpose, council instead was beholden to established downtown property owners and that anticompetitive effects were the intention rather than a harm balanced against public benefits? How many other councils make similar decisions that never are noticed, because they prohibit development *before* the competitor has built a site?

If any of these seem potentially more consequential than, for example, mergers in the DJ software and equipment sector, there could be merit in legislative change enabling the Commission to focus its considerable talent in more fruitful areas.

Hamlin’s paper suggests useful first steps in broadening the scope of the Act by limiting the scope of the Crown exception. He has also proposed draft legislation that would give effect to the paper’s recommendations.

I hope to be able to append this short response to Hamlin’s excellent paper to an eventual submission on his proposed legislation at Select Committee.

1. Commerce Commission. 2024. “Commission declines clearance for AlphaTheta’s proposed acquisition of Serato.” 18 July. <https://comcom.govt.nz/news-and-media/media-releases/2024/commission-declines-clearance-for-alphathetas-proposed-acquisition-of-serato> [↑](#footnote-ref-2)
2. ATC / Serato. 2024. “Serato submission on Statement of Unresolved Issues.” 17 June. Available at <https://comcom.govt.nz/__data/assets/pdf_file/0026/355733/Serato-Submission-in-response-to-Statement-of-Unresolved-Issues-17-June-2024.pdf> [↑](#footnote-ref-3)
3. Ternouth, Louise. 2024. “Community pharmacists afraid for future of business and patient care.” *Radio New Zealand.* 31 July. <https://www.rnz.co.nz/news/national/523520/community-pharmacists-afraid-for-future-of-business-and-patient-care> [↑](#footnote-ref-4)
4. Bargain Chemist Upper Hutt Central’s website notes prescriptions are not currently available. <https://www.bargainchemist.co.nz/pages/bargain-chemist-upper-hutt-central> PharmacyToday reported, in 2022, that they had been unable to get a response from HealthNZ when seeking an Agreement. See Chilton-Towle, Jonathan. 2022. “New Bargain Chemist in Upper Hutt unable to dispense.” 5 September. Available at <https://www.pharmacytoday.co.nz/article/news/new-bargain-chemist-upper-hutt-unable-dispense> .   
   Pharmacies require (at least) two permission slips to operate. They need a licence, and they also need to enter into an Integrated Community Pharmacy Services Agreement with Te Whatu Ora to, among other things, dispense funded medicines. The decision-making criteria when evaluating proposals for new Integrated Community Services Agreements includes “Proximity to other pharmacy services in the proposed location – what services, distance from proposed site, staffing”, with high weight put on this condition – see discussion at Paragraph 71 in Judgment of Gwyn J in New Zealand Independent Community Pharmacy Group v Te Whatu Ora [2023] NZHC 1486 [15 June 2023].   
   I note that prioritising applications in underserved places can mean downweighing applications in places near existing pharmacies – with obvious anticompetitive consequences. The Panel assessing a supermarket’s application to enter into a Services Agreement with Te Whatu Ora noted that the opening of the supermarket pharmacy could detract from the ability of existing pharmacies “to operate efficiently and effectively.” See discussion at paragraph 76. Are these restraints on competition really the most practicable way of giving effect to any laudable public purpose here?   
   Separately, the license to operate a pharmacy requires demonstrating that the pharmacy is majority owned and controlled by registered pharmacists. The judgment ultimately held, on the issue of pharmacy licenses and ownership and control requirements, that Section 55D of the Medicines Act was intended to have been read restrictively. Pharmacy companies, rather than just pharmacy operations, are to be effectively majority controlled by pharmacists.   
   Legislative barriers to entry in pharmacy seem substantial. I thank Paul Comrie Thomson for the pointer to this decision. [↑](#footnote-ref-5)
5. Thomas-Maude, Johanna. 2024. *Understanding the Registration Experiences of Overseas-Trained Medical Doctors in Aotearoa New Zealand: A Snapshot*. Institute of Development Studies Working Paper (July), available at <https://mro.massey.ac.nz/items/008a2060-e15d-4d40-a7a6-31d15a9e87bf> [↑](#footnote-ref-6)
6. I use the term cartel here in its economic and moral sense, rather than its legal sense. But really. If it looks like a duck and it quacks like a duck and it leaves a mess on the lawn like a duck… [↑](#footnote-ref-7)
7. Broughton, Cate. 2022. “UK-trained neurosurgeon takes legal action against Medical Council after being denied specialist role in NZ.” *Stuff.* 7 March. Available at <https://www.stuff.co.nz/national/health/127955802/uktrained-neurosurgeon-takes-legal-action-against-medical-council-after-being-denied-specialist-role-in-nz> [↑](#footnote-ref-8)
8. Malpass, Luke. 2024. “Chris Bishop sets out radical land use and planning reforms.” *The Post*. 4 July. <https://www.thepost.co.nz/politics/350331318/chris-bishop-set-out-radical-land-use-and-planning-reforms> [↑](#footnote-ref-9)
9. Commerce Commission. 2022. “Submission on the Natural and Built Environment Bill and Spatial Planning Bill.” Submission to the Environment Committee. 2 February. Available at <https://comcom.govt.nz/__data/assets/pdf_file/0024/343185/Submission-to-Environment-Committee-on-the-Natural-and-Built-Environment-Bill-and-Spatial-Planning-Bill-2-February-2022.pdf> [↑](#footnote-ref-10)
10. Minister of Commerce. 2024. “Annual letter of expectations 2024/25”. <https://comcom.govt.nz/__data/assets/pdf_file/0026/317906/Ministers-Letter-of-Expectations-2024-25-11-April-2024.pdf> [↑](#footnote-ref-11)
11. Hamlin, Ben. 2024. “Wellington, we have a problem: Application of competition law to the public sector in the 21st Century.” Prepared for *Competition Law and Policy Institute of New Zealand,* 16/17 August. Based on Hamlin, Ben. 2023. “The Queen is Dead: Time to Bury the Crown Exception.” *New Zealand Law Review* Volume 2, p. 225-. [↑](#footnote-ref-12)
12. Yandle, Bruce. 1983. “Bootleggers and Baptists – the Education of a Regulatory Economist.” *AEI Journal on Government and Society.* [↑](#footnote-ref-13)
13. Universities New Zealand. “Programme approval and accreditation / CUAP”. <https://www.universitiesnz.ac.nz/quality-assurance/programme-approval-and-accreditation-cuap> [↑](#footnote-ref-14)
14. PWC. 2024. “Medical education in New Zealand: Current state and consideration of future options.” Report for the University of Auckland and University of Otago. July. Available at <https://www.auckland.ac.nz/assets/news-and-opinion/2024/07/web-medical-education-NZ-July-2024-PwC-report.pdf> [↑](#footnote-ref-15)
15. Burns, Adam. 2021. “Ashburton developers disappointed at consent decision”. Stuff. 21 October. <https://www.stuff.co.nz/national/politics/local-democracy-reporting/300435509/ashburton-developers-disappointed-at-consent-decision> [↑](#footnote-ref-16)