

Submission on the Natural and Built Environment Bill and Spatial Planning Bill

Submitted to:

Environment Committee

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Commerce Commission submission on the Natural and Built Environment Bill and Spatial Planning Bill

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission to the Environment Committee (the Committee) on the Natural and Built Environment Bill (NBEB) and the Spatial Planning Bill (SPB).
2. The Commission is an independent Crown entity and is New Zealand's primary competition, fair trading, consumer credit, and economic regulatory agency. Our vision is to make New Zealanders better off. We work to ensure markets work well and that consumers and businesses are confident market participants.
3. The Commission is submitting on these Bills on the basis of:
 - 3.1 our role as New Zealand's primary competition regulator;
 - 3.2 having been responsible for undertaking a market study into the retail grocery sector, which made several recommendations relating to planning law¹; and
 - 3.3 our role as the economic regulator for a number of network utilities, including telecommunications, electricity transmission and distribution, gas pipelines, and a proposed role in respect of the new Water Services Entities.
4. Our submission is divided into two parts. The first part focuses on two recommended changes to the NBEB to promote competition. The second part focuses on recommended changes to the NBEB and SPB to ensure the interests of network utility operators are taken into account in the new planning system.

Executive Summary

5. The Commission recommends two changes to the Natural and Built Environment Bill to promote competition. Both recommendations align with recommendations made as part of our retail grocery market study:
 - 5.1 We recommend making it explicit that the positive outcomes associated with trade competition (and negative outcomes associated with reduced competition) may (and should) be considered in planning instruments and consenting decisions under the Natural and Built Environment Bill; and

¹ Commerce Commission. (2022). *Market study into the retail grocery sector: Final report*. Retrieved from: https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf. The relevant text is contained at Paragraphs 6.59 to 6.74, and 9.24 to 9.56, of our final report.

- 5.2 We recommend considering prohibiting decision-makers from declining retail and commercial developments on the basis of adverse retail distribution effects on existing commercial centres.²
6. We consider that these changes should help to facilitate greater competition across the economy, and have benefits for consumers in terms of lower price, higher quality, more choice, and greater convenience. We also consider that these recommendations could be implemented in a way that benefits competition without negatively impacting on the environment.
7. We also recommend changes to ensure that infrastructure considerations are appropriately taken into account in the new planning system. Specifically, we recommend that the NBEB and SPB be amended so that Regional Planning Committees under both Bills are explicitly required to consult network utility operators in the course of developing Regional Spatial Strategies, associated Implementation Plans, and the infrastructure aspects of Natural and Built Environment Plans.

Part 1: Recommendations to promote competition

8. This part of our submission focuses on changes that could be made to the NBEB to facilitate greater competition across the economy, particularly between retail and other commercial developments (such as hospitality outlets).

Why is competition important?

9. Competition is the process of rivalry between businesses to win and retain customers. Competition is one of the drivers of well-functioning markets and can contribute to the wellbeing of New Zealanders and the economy by:
- 9.1 encouraging businesses to lower costs and prices and provide a better range of quality products and services to their customers;
 - 9.2 encouraging businesses to invest efficiently and innovate;
 - 9.3 empowering consumers by increasing their choice of products and services and encouraging businesses to provide information for consumers to make good purchasing choices;
 - 9.4 contributing to New Zealand's economic growth and international competitiveness by encouraging New Zealand's resources to be used in the most valuable way;
 - 9.5 constraining market power which can lead to unreasonably high profits for businesses and less choice for consumers;

² 'Commercial centres' refer to retail and business 'hubs' such as a central business district or suburban equivalent.

- 9.6 encouraging businesses to invest in sustainable inputs and employ environmentally-friendly production methods if they can gain a competitive advantage, for example to meet consumer demand for environmentally-friendly products or services or to cut costs; and
- 9.7 encouraging a range of businesses to thrive, including those that meet the needs of different consumer groups, for example, Māori, Pacific and other ethnic communities.

Planning law can have a significant impact on competition

- 10. We consider that planning law can have a significant impact on competition. Most notably, planning law can affect the conditions of entry and expansion (i.e. how easy it is for businesses to set up and expand). Ways this might occur include:
 - 10.1 zoning rules can impact on the number of suitable sites that are available for businesses to use;
 - 10.2 rule setting, notification, and consenting processes can cause delay and uncertainty in the establishment or expansion of businesses; and
 - 10.3 businesses may attempt to use planning law to hinder their competitors' access to or ability to develop suitable development sites.
- 11. The retail grocery market is the clearest example we have of the ways in which planning law can affect competition. However, the impacts of planning law on competition almost certainly extend into other forms of retail and commercial developments. Generally, we would expect planning law to have the most significant impact on competition in markets where the quantity of floorspace required is high (such as 'big box' retail) and where the needs of businesses in terms of site location are relatively specific (i.e. a retail development is unlikely to succeed if situated amongst farmland).

The new planning system includes some measures that are likely to promote competition

- 12. The Natural and Built Environment Bill contains some measures that are likely to promote competition.
- 13. This includes:
 - 13.1 under clause 5 of the NBEB, one of the system outcomes that the national planning framework and all plans must provide for is well functioning urban and rural areas that are responsive to the diverse and changing needs of people and communities in a way that promotes:
 - 13.1.1 the use and development of land for a variety of activities, including for housing, business use, and primary production;
 - 13.1.2 the ample supply of land for development, to avoid inflated urban land prices;

- 13.1.3 an adaptable and resilient urban form with good accessibility for people and communities to social, economic, and cultural opportunities;
- 13.2 various provisions of the NBEB, including subpart 5 of Part 4, restrict the participation of persons in certain planning processes if they are a trade competitor of a person applying for resource consent or other permissions under the NBEB;
- 13.3 a range of provisions prohibit consideration of trade competition or the effects of trade competition, including in relation to:
 - 13.3.1 a regional planning committee preparing or changing a plan (clause 108);
 - 13.3.2 a consent authority considering an application for a resource consent (clause 223);
 - 13.3.3 the Minister making a decision as to whether an activity will have or is likely to have adverse effects on the environment that are more than minor (clause 372);
 - 13.3.4 a regional planning committee considering a notice of requirement for a designation (clause 512);
 - 13.3.5 commissioners making recommendations on a proposed plan change (clause 60 of schedule 7); and
 - 13.3.6 when an independent hearings panel is formulating its recommendations on a proposed plan (clause 126 of schedule 7).
- 14. We also understand that the new resource management system, of which the NBEB forms a key part, is generally intended to promote faster and more certain outcomes.³ This may also help to facilitate competition.

We recommend two changes to the Natural and Built Environment Bill to promote competition

- 15. The Commission supports including measures in the NBEB that are designed to promote competition or limit the ability of planning law to be used for anticompetitive purposes. This includes the provisions in the NBEB (largely carried over from the Resource Management Act 1991 (RMA)) that restrict the participation of persons in certain planning processes if they are a trade competitor of a person applying for resource consent or other permissions under the NBEB.

³ Parker, D. (22 November 2022). *Faster, cheaper, better resource management law given first reading*. Retrieved from: <https://www.beehive.govt.nz/release/faster-cheaper-better-resource-management-law-given-first-reading>.

16. However, the Commission recommends two changes to the Natural and Built Environment Bill. These changes are aimed at facilitating greater competition across the economy. Both recommendations are based on the findings of our retail grocery market study. While limited to the grocery sector, our findings in that study in respect of planning law are likely to be relevant to retail and other commercial activity more generally.
17. The changes we recommend are:
 - 17.1 Making it explicit that the positive outcomes associated with trade competition (and negative outcomes associated with reduced competition) may (and should) be considered in planning instruments and consenting decisions; and
 - 17.2 Considering prohibiting decision-makers from declining retail and other commercial developments on the basis of adverse retail distribution effects on existing commercial centres.
18. We consider that these recommendations could be implemented in a way that benefits competition without negatively impacting on the environment.
19. We elaborate on these recommendations below.

We recommend making it explicit that the positive outcomes of trade competition may (and should) be considered in planning instruments and consenting decisions

20. As stated above, there are a number of provisions in the NBEB that prohibit consideration of trade competition or the effects of trade competition (separate from the provisions relating to when trade competitors may participate in planning processes). These appear to be lifted from the equivalent provisions in the RMA.
21. We understand that the original intent of including these provisions in the Resource Management Act was to ensure that businesses were not able to oppose development by their competitors.⁴ However, on their face, the provisions also appear to prohibit the positive impacts of competition from being considered, and the courts have sought legislative amendment to clarify the intent. For example, in once case the court stated:

Read literally, section 104(3)(a)(i) has the effect that the good effects of trade competition- such as the tendency to increased competition and lower prices - cannot be had regard to. Nor could any consequential effects on social conditions. The courts have rather contorted themselves over this in

⁴ Upton, S. (19 December 1997). *Resource Management Amendment Act Passed*. Retrieved from: <https://www.beehive.govt.nz/release/resource-management-amendment-act-passed>; Ministry for the Environment “Resource Management Amendment Act 2009 – Fact Sheet 2: Trade Competition, Representation at Proceedings and Environment Courts Costs” (October 2009), available at: <https://environment.govt.nz/assets/Publications/Files/Resource-management-amendment-act2009-Fact-Sheet-2.pdf>.

*the RMA. [...] In our respectful view it would be useful if Parliament could amend section 104 to make its directions simpler to understand*⁵

22. The courts have stated that these provisions can be read as allowing the positive impacts of competition to be considered. For example, one recent case stated:
- section 104(3)(a) states that a consent authority must not have regard to trade competition when considering an application. As the Environment Court observed two decades ago [...] it is not all effects of trade competition which are to be disregarded but only the anti-competitive - or "rent-seeking" - ones. I consider the broad language in section 104(3) and Part 11A RMA needs to be read subject to that qualification in order for New Zealand commercial law, including the RMA, to continue its trend toward being, as Baragwanath J put it, a "seamless whole"*⁶
23. However, it is not clear that this is well understood.
24. Clause 6 of the NBEB does include decision-making principles that require the Minister and every regional planning committee to actively promote the outcomes provided for under the NBEB (including reference to development of land for business use as set out above) and recognise the positive effects of using and developing the environment to achieve these outcomes. However, it is not clear whether this is intended to override the provisions of the NBEB that prohibit consideration of the effects of trade competition, as outlined above.
25. To the extent that lack of legislative clarity inhibits consideration of the positive impacts of trade competition, this may result in fewer retail or commercial developments being approved. This outcome would deprive consumers of benefits in terms of lower price, higher quality, more choice, and greater convenience.
26. We therefore recommend amending clause 108, clause 223, clause 372, clause 512, clause 60 of schedule 7, and clause 126 of schedule 7 to make it clear that decision-makers may (and should):
- 26.1 take into account the benefits of increased competition that may flow from a development; and
 - 26.2 take into account the detriments of decreased competition that may flow from a development;⁷ but
 - 26.3 not take into account any harm that any individual competitor may suffer from increased competition; and

⁵ *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* [2012] NZEnvC 135 at [35].

⁶ *Bunnings Ltd v Queenstown Lakes District Council* [2018] NZEnvC 135 at [35]-[36].

⁷ For example, if there is only limited land available that is suitable for particular commercial activity (such as a supermarket), and a resource consent is sought to rezone that land for residential housing.

- 26.4 not take into account any benefit that any individual competitor may receive from decreased competition.
27. We also recommend a corresponding amendment to the heading of Subpart 5 of Part 4 of the NBEA. Currently this is titled “Trade competition not relevant consideration under this Act”. We recommend alternative wording along the lines of “impacts on individual competitors not relevant consideration under this Act”.
28. This recommendation aligns with recommendation 1E of our retail grocery market study.

We recommend considering prohibiting decision-makers from declining retail and commercial developments on the basis of adverse retail distribution effects on existing commercial centres

29. In addition to uncertainty as to whether decision-makers may formally consider the positive impacts of competition under the RMA, the courts have stated that, while they may not have regard to the direct effects of trade competition, it is legitimate to take into account flow-on ‘retail distribution effects’ such as a downturn in business in an existing shopping centre that might flow from a development, when considering a request for resource consent. This does not mean that an adverse effect must threaten the viability of existing centres in order to be considered. Rather, when deciding whether or not to grant a resource consent, decision-makers may – in effect – choose to decline a consent if it would lead to a significant downturn in economic activity in existing retail or commercial centres.⁸
30. This interpretation appears to continue to have been applied *despite* amendments to the Resource Management Act in 2009 that sought to clarify that in addition to decision-makers not being able to have regard to trade competition, they may also not have regard to the *effects* of trade competition.⁹ For example:
- 30.1 A 2013 report from Auckland Council states that “despite the changing legal landscape relating to retail distribution since the inception of the RMA in 1991, it is now settled law that a proposed activity’s economic and social effects may be a relevant matter for a consent authority [...] potential effects of commercial distribution are sometimes referred to as retail distributional effects and they have now been recognised by the Environment Court in a number of cases.”¹⁰

⁸ *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17 at [119]-[120].

⁹ Ministry for the Environment. (2009). *Resource Management Amendment Act 2009. Fact Sheet 2: Trade Competition, Representation at Proceedings and Environment Court Costs*. Retrieved from: <https://environment.govt.nz/assets/Publications/Files/Resource-management-amendment-act-2009-Fact-Sheet-2.pdf>.

¹⁰ Auckland Council “Section 32 report on the Proposed Auckland Unitary Plan: Appendix 3.4.1 – Case law – centres and commercial activity” (2013) at 139, available at: <https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/history-unitary-plan/documentssection32reportproposedaup/appendix-3-4-1.pdf>.

- 30.2 A 2021 application for fast-track consent for a development containing a supermarket places significant emphasis on convincing decision-makers that the proposed development would not impact on the viability of existing grocery retailers and therefore not have significant retail distribution effects.¹¹
31. Part of this appears to hang on the definition of “environment” in the RMA, which includes social, economic, aesthetic, and cultural conditions and their effect on people, communities, and amenity values. It also relates to the duty in the RMA to avoid, remedy, or mitigate adverse effects on the environment.¹²
32. The definition of the environment in the Natural and Built Environment Bill does not refer to amenity values. However, it still refers to the social, economic and cultural conditions that affect people and communities and the built environment they create. It also still includes a duty to avoid, remedy or mitigate adverse effects on the environment.¹³ As such, it appears that the NBEB may continue to provide decision-makers with the ability to decline retail and commercial development on the basis that they may have a negative impact on existing commercial centres.
33. A continued ability to decline developments on this basis is likely to have a negative impact on competition. A generally accepted element of the process of competition is that new or expanding entrants may compete away the margins of incumbents, and in some cases lead to these firms exiting the market. Prohibiting developments on the basis of adverse retail distribution effects is arguably not consistent with this concept of competition, and may – as above – result in consumers continuing to lose out on benefits such as lower price, higher quality, more choice, and greater convenience.
34. Given this, we recommend considering amending the NBEB to remove the ability for retail and other commercial developments to be declined on the basis of adverse retail distribution effects on existing commercial centres.
35. We recognise that planning and resource management involves seeking to balance a range of objectives, and that there may be concern that if adverse retail distribution affects cannot be taken into account, then this may impact on the ability of decision-makers to recognise legitimate social, environmental, cultural, or other impacts that may arise from developments. We think that such legitimate effects would generally fall outside of the category of ‘retail distribution effects’ and consideration of these effects should not be affected by this proposal. However, if the Committee is not minded to proceed with this proposal on the basis that it is concerned about its impacts, we would at least urge the Committee to consider options to promote

¹¹ Property Economics “New World Dominion Road Retail Impact Assessment” (March 2021) at 24, available at: https://www.epa.govt.nz/assets/Uploads/Documents/Fast-track-consenting/Dominion-Rd/Application-documents/App_21_Retail_Impact_Assessment.pdf.

¹² Sections 2 and 17 of the Resource Management Act respectively.

¹³ Clauses 7 and 14 of the Natural and Built Environments Bill.

greater transparency of the rationale for decision-making in instances in which developments that would promote competition are declined.

36. This recommendation aligns with recommendation 1F of our retail grocery market study.

Part 2: Recommendations relating to infrastructure

37. This part of our submission focuses on changes that could be made to the SPB and NBEB to ensure that infrastructure considerations are appropriately taken into account in the new planning system.

Context

38. The Commerce Commission is the economic regulator of a number of network utilities, including telecommunications, electricity transmission and distribution businesses, and gas pipelines. The Commission is also proposed as the economic and consumer protection regulator for the four Water Services Entities to be established under the Three Waters reforms. As such, the Commission has a strong interest in aspects of the NBEB and SPB that impact infrastructure and network utility providers specifically.

Comments on the Spatial Planning Bill

39. The Spatial Planning Bill includes a range of provisions that appear designed to ensure infrastructure considerations are appropriately taken into account in Regional Spatial Strategies (Strategies):
- 39.1 Clause 17 sets out the required content of Strategies. This includes (at clause 17(1)(g)) a requirement for Strategies to contemplate major existing, planned, or potential infrastructure or major infrastructure corridors, networks, or sites (including existing designations) that are required to meet current and future needs.
- 39.2 Under clause 17(1)(h), Strategies are required to contemplate other infrastructure matters, including:
- 39.2.1 opportunities to make better use of existing infrastructure; and
- 39.2.2 the need for other small-to-medium-sized infrastructure required to meet future needs or enable development.
- 39.3 In the preparation of Strategies, Regional Planning Committees are required to adopt a Plan having followed a process, set under clause 30, that encourages participation of the public and all interested parties, particularly those who may be involved in implementing the Strategy.
- 39.4 In contemplating the scope of a Strategy, clause 15(2) requires that – in meeting the requirements of clause 15 and clause 16 – a Strategy must support a co-ordinated approach to infrastructure funding and investment by central government, local authorities, and other infrastructure providers.

- 39.5 Under clause 53, before adopting or amending an implementation plan, a Regional Planning Committee must consult each person who is to have responsibility under the plan for delivering all or part of a priority action and obtain their agreement to having the responsibility assigned.
- 39.6 Clause 64(1) places a duty on network utility operators approved as requiring authorities to provide information or technical support to a Regional Planning Committee if the Committee requests the information or support to assist it in performing or exercising its powers functions or duties under the Bill.

We recommend explicitly requiring Regional Planning Committees to consult network utility operators in the course of developing a Regional Spatial Strategy and associated Implementation Plan

40. The Commission considers the involvement of network utility operators in the development of the Regional Spatial Strategies and Plans is essential. Utility network operators own and/or are responsible for operating hundreds of billions of dollars of infrastructure critical to the attainment of the outcomes sought by Regional Spatial Strategies. In the Commission's view, outcomes sought from Strategies cannot be achieved without the involvement of network utility operators in the development of the Strategy and associated Implementation Plan. Indeed, the SPB appears to contemplate it at clause 64(1)(e).
41. While the SPB places a strong expectation of engagement upon Regional Planning Committees, it does not explicitly require the involvement of network utility providers in the development of Strategies or Plans. Given the importance of network utility infrastructure, the Commission recommends amending the SPB so that Regional Planning Committees are explicitly required to consult network utility operators in the course of developing a Regional Spatial Strategy and associated Implementation Plan.¹⁴

Comments on the Natural and Built Environment Bill

42. Clause 102 of the NBEB sets out what Natural and Built Environment Plans must contain. In particular, clause 102(2)(i) states that a Plan must ensure the integration of infrastructure with land use. The contents of such Plans will have significant implications for network utility providers.

We recommend explicitly requiring Regional Planning Committees to consult network utility operators in the course of developing a Natural and Built Environment Plan

43. As above, clause 102(2)(i) of the NBEB states that a Plan must ensure the integration of infrastructure with land use. In keeping with our comments in respect of the development of Regional Spatial Strategies, we also recommend that the NBEB be amended to require this aspect of the Plan to be developed in consultation with network utility providers.

¹⁴ We do not envisage that network utility operators would be required to engage in consultation processes.

Conclusion

44. We thank the Committee for this opportunity to make a submission and are available to present on the matters discussed in this submission to the Committee. If the Committee has any specific questions on this submission, please contact Cam Vannisselroy, Principal Policy Analyst, at [REDACTED]

Attachment 1: Background on the Commission's retail grocery market study

45. On 17 November 2020, the Hon Dr David Clark, then Minister of Commerce and Consumer Affairs, published a notice under section 51(1) of the Commerce Act, requiring the Commission to undertake a study into any factors that may affect competition for the supply or acquisition of groceries by retailers in New Zealand.
46. On 8 March 2022, we published our final report on our market study into the retail grocery sector. It found that competition is not working well for consumers in the retail grocery sector. To improve competition, we made 14 recommendations, including one overarching recommendation to improve the availability of sites for retail grocery stores under planning law. This was supported by six sub-recommendations:
 - 46.1 Recommendation 1A: District Plans should include sufficient land that is zoned to enable choice in sites for the development of retail grocery stores;
 - 46.2 Recommendation 1B: The new planning system should require Regional Spatial Strategies to provide sufficient spare capacity to enable choice in sites for the development of retail grocery stores;
 - 46.3 Recommendation 1C: The new planning system should require every plan under the Natural and Built Environment Act to include a minimum proportion of urban land that is zoned for retail grocery stores;
 - 46.4 Recommendation 1D: The new planning system should limit the discretion available to decision-makers regarding the approval of retail grocery stores;
 - 46.5 Recommendation 1E: The positive outcomes of trade competition should be able to be considered in planning instruments under the Natural and Built Environment Act; and
 - 46.6 Recommendation 1F: Retail grocery store development should not be able to be declined on the basis of adverse retail distribution effects on existing commercial centres.
47. In its response to our retail grocery market study, the Government agreed in principle to our recommendation relating to planning law.¹⁵ Recommendation 1A was directed at territorial authorities and Recommendations 1B-D were expected to be implemented through national direction that would be put in place after the new planning legislation was in effect. Recommendations 1E and 1F were intended to be implemented as part of the new Natural and Built Environment Bill. However, the NBEB as introduced does not adopt these recommendations.

¹⁵ MBIE. (2022). *Government response to the Commerce Commission's final report on the New Zealand retail grocery sector*. Retrieved from: <https://www.mbie.govt.nz/dmsdocument/25654-response-to-the-commerce-commissions-retail-grocery-sector-market-study-summary>.