

Promoting competition in residential building supplies

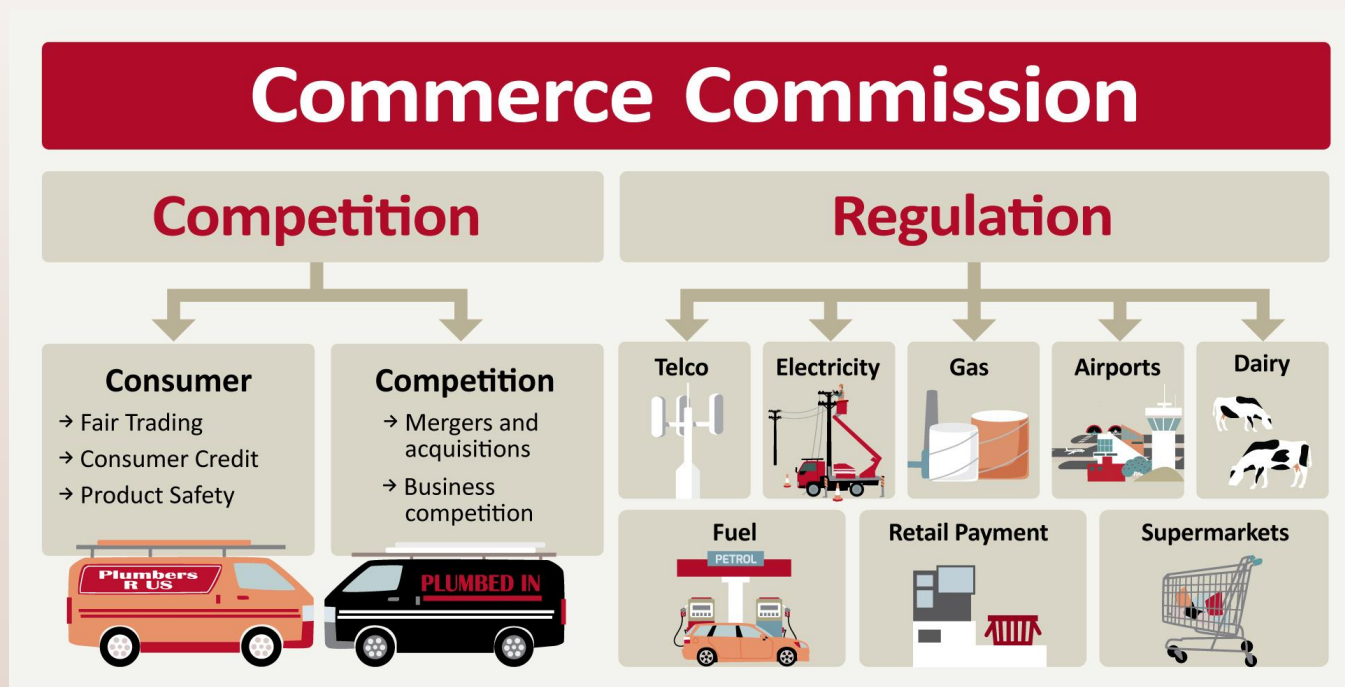
Constructive - NZ Construction Forum
25 August 2022

Antonia Horrocks
General Manager – Competition



The Commerce Commission

- We are New Zealand's primary competition, fair trading and consumer credit, and economic regulatory agency
- Our vision is that ***New Zealanders are better off*** when markets work well, and consumers and businesses are confident market participants



Fair Trading and Competition work in the construction sector



- Fair Trading Act investigations
 - False and misleading, and/or unsubstantiated claims about:
 - Building wrap
 - Global Fibre8 (wall panel system)
 - Steel Mesh – fines of over \$2.8 million for 5 companies supply steel mesh
- Competition investigations and outreach
 - Commercial timber company fined \$1.8 in 2014 million for price fixing in the Auckland commercial timber market.
 - Outreach projects around detection of bid rigging/other cartel conduct in public procurement
- Merger control
 - Clearance granted to Fletcher Distribution to acquire six building products stores, and a frame and truss manufacturing plant, from Tumu Merchants
 - Further mergers in recent years relating to roofing tiles, concrete & mortar products, modular suspended ceiling systems, aggregates & other products

Recent law changes

- Cartel conduct became a criminal offence under the Commerce Act in April 2021.
- Abuse of market power test in the Commerce Act amended -- new provision introducing an effects test applies from April 2023
- Changes to the Fair Trading Act came into effect on 16 August strengthening protections for businesses and consumers and tackling unfair business practices in Aotearoa New Zealand. The changes are:
 - Unfair contract terms provisions are extended to cover standard form small trade contracts
 - Unconscionable conduct in trade is prohibited
 - People will be able to ask salespeople to leave or not enter their home

Market studies -- why residential building supplies?

- Important part of New Zealand's building and construction industry – vital to ensuring housing supply can meet demand
- Concerns raised about a range of issues, including rising building costs
- Market study allows us to consider the industry's approach:
 - How effectively competition is working within the industry
 - Where it may be able to be improved for the long-term benefit of Kiwis



Context and next steps

- **Oct 2018** – Parliament passed amendment to the Commerce Act empowering the Commission to undertake market studies
 - Fuel market study report published December 2019
 - Grocery market study report published March 2022
- **Nov 2021** – Government announcement of market study into *“any factors that may affect competition for the supply or acquisition of key building supplies used to build the major components of residential buildings”*
- **4 Aug 2022** – draft report published, incorporating stakeholder and survey feedback and te ao Māori perspectives
- **26 Sep 2022** – week of consultation conference
- **13 Oct 2022** – conference and cross-submissions
- **6 Dec 2022** – final report due

Issues “old news” to the industry?

ComCom pushes suite of proposals for building supplies sector

Draft recommendations aim to improve competition and allow new products to enter market with ease.



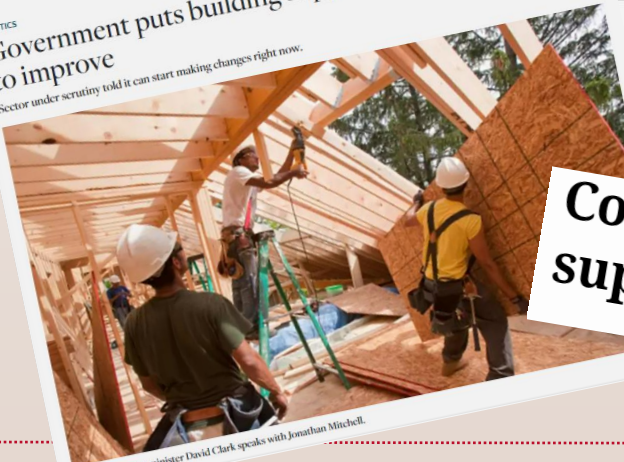
Government wants to get a better deal for consumers.



Jonathan Mitchell
Thu, 04 Aug 2022

Government puts building supplies sector on notice to improve

Sector under scrutiny told it can start making changes right now.



Consumer affairs minister David Clark speaks with Jonathan Mitchell.



Builders 'hamstrung' for years'

By Hamish MacLean
Business

When builders have been "hamstrung for years" by a small group of building suppliers and strict rules around new products into the country, Builders president Sacha



Commission's draft market review in the residential industry, released by the established building industry in the regulatory "deliberate focus"

Building supplies draft report finds competition not working

Thu, Aug 4 • Source: iStock

A draft report into the cost of building materials in New Zealand has found competition isn't working.



Commerce Commission market study recommendation supports industry's call

7:19PM, 4 August 2022

Today's Commerce Commission findings included a strong recommendation for the establishment of a centralised digital national key products registry to increase trust and confidence in residential building supplies. Research conducted by GS1 New

Supplier backhanders lock out new building products – Commerce Commission

INFRASTRUCTURE

Designers, builders and building consent authorities have tested local products, at expense of

Building supplies market 'not working as well as it could' Commerce Commission says in draft report into competition in the residential building supplies industry



4th Aug 22, 9:05am by Rebecca Stevenson

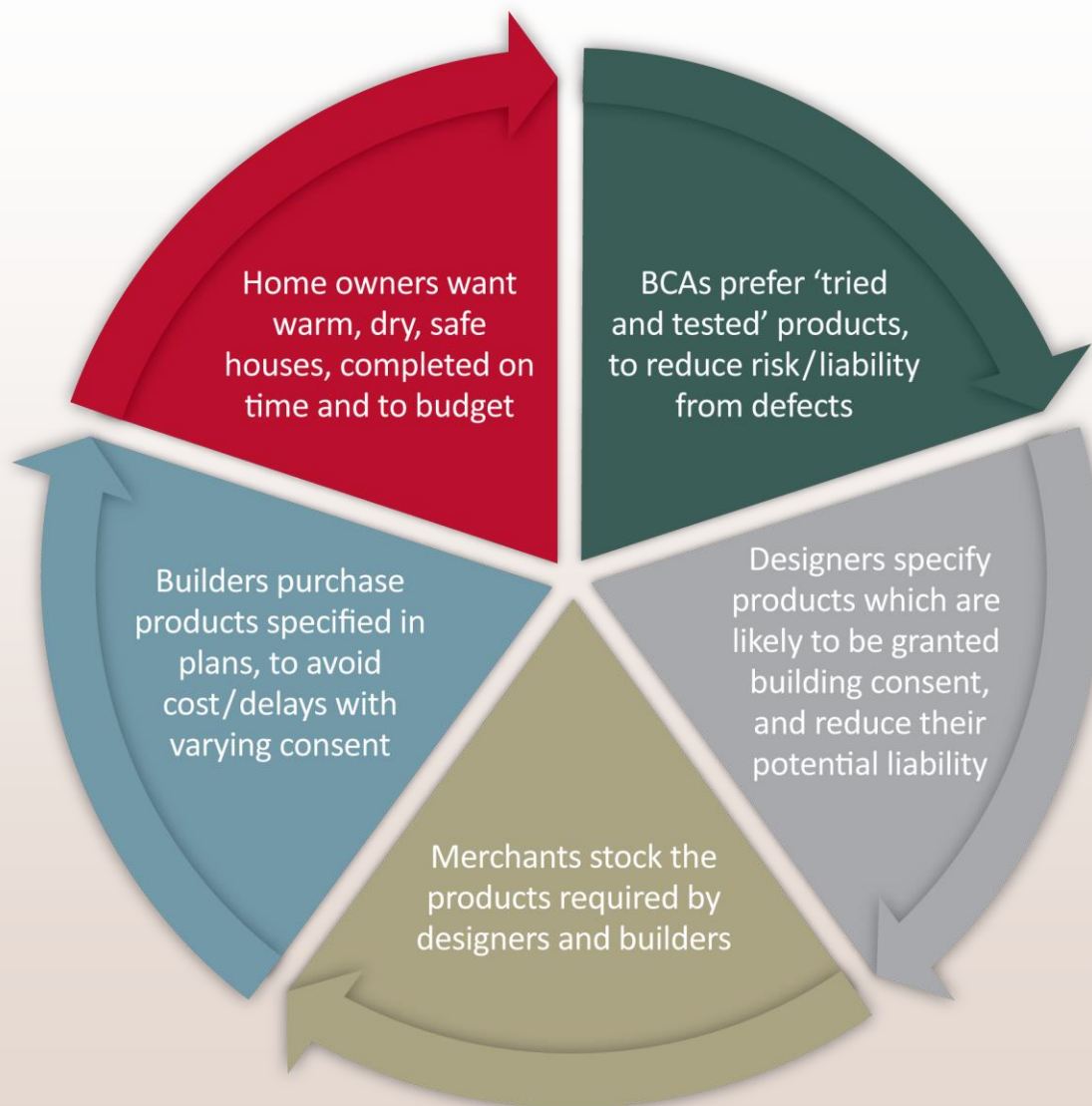
ComCom: 'vertical' building suppliers not the problem



Draft report – what we found

- New Zealand building sector is governed by a building regulatory system, which has at its heart, the provision of safe, healthy, and durable homes for New Zealanders.
- While innovation is recognised as important, preliminary view is that the regulatory system has a number of features that prevent competition from working well
- Despite flexibility to use new products being available in the system, it is too slow, costly and uncertain to get them accepted for general use
- Building Code and associated systems are complex to navigate and competition is not an express objective of the Building Act
- Combined effect of the regulatory system and the decisions made by designers, builders and building consent authorities working within the system is to favour ‘tried and tested’ building products over new or competing product.

Decision-making in building



The market study shows that 'tried and tested' products have become embedded in home-building practice in New Zealand – and the building regulatory system should include competition as a deliberate objective

Two main factors negatively impacting competition

- Competition for the supply of key building supplies is not working as well as it could if it was easier for building products to be introduced and expand in relevant markets
- The solution lies in improving conditions for entry and expansion which in turn will improve competition for key building supplies
- We identified two main factors making it difficult for competing products to be introduced and expand:
 - The regulatory system continues to incentivise designers, builders and building consent authorities to favour “tried and tested” building products over new or competing products
 - Quantity-forcing rebates paid by some established suppliers to merchants appear to be reinforcing barriers to distributing new or competing products in some product markets
- As in previous studies, we have identified restrictive land covenants and exclusive leases that benefit merchants and areas of further potential work for the Commission using its compliance and enforcement functions and powers

The regulatory system

- The regulatory system has a number of features that prevent competition from working well
- Despite flexibility to use new products, it is too slow, costly and uncertain to get them accepted for general use
- This is due to the combined effect of:
 - The way the regulatory and standards systems (comprising the Building Act, the Building Code, and related instruments, and the consenting system) are applied to building products
 - The decision-making behaviours of designers, builders and building consent authorities in response to, and in applying, the regulatory and standards systems
- Similar issues identified for discussion by MBIE's recently announced review of the building consent system

Quantity-forcing rebates

- Quantity-forcing rebates paid by some established suppliers to merchants appear to be reinforcing barriers to distributing competing products in some product markets
 - These rebates reward merchants for purchasing greater volumes through a single supplier, by offering higher percentage rebates that apply across all of a merchant's purchases with that supplier
 - They can deter merchants from stocking competing products in their stores, making it more difficult for new or smaller suppliers to get established in the market
 - Their payment from suppliers to merchants appears in some circumstances to be reinforcing regulatory factors relating to entry or expansion, making it difficult for new or competing products to access distribution channels or increase sales



Other preliminary findings

- At the merchant level, merchants are benefitting from restrictive covenants on land and entering into exclusive leases with landlords and this has the potential to impact competition
- Independent of the study, we continue to consider the appropriate use of the Commission's compliance and enforcement functions and powers under the Commerce Act in relation to some strategic business conduct
- Vertical integration does not appear to be a factor affecting competition over the longer term:
 - Outside of the current supply shortages, any concerns regarding merchants' ability to access key building supplies do not appear to be due to vertical integration
 - There are a range of independent distribution options available to non-vertically integrated suppliers.

Draft recommendations

- We have identified a range of draft recommendations to improve competition and produce better long-term market outcomes for homeowners and other end-consumers without compromising key objectives of the building regulatory system to deliver safe, healthy, durable homes
- Our draft recommendations include a range of measures designed to:
 1. Enhance the regulatory system
 2. Support sound decision-making
 3. Address strategic business conduct



1. Enhancing the regulatory system

- Introduce competition as an objective to be promoted in the Building Regulatory System
- Better reflect a Māori perspective in the Building Regulatory System
- Create more compliance pathways for a broader range of key building supplies
- Explore ways to remove impediments to product substitution and variations
- Investigate whether the barriers to certification and appraisal can be reduced



2. Supporting sound decision-making

- Identify and develop methods to centralise information sharing about key building supplies
 - Establish a national building products register as a centralised repository for sharing information about building products and consenting.
 - Establish a building consent authority centre of excellence to facilitate a better co-ordinated and enhanced approach by building consent authorities to consenting and product approval processes
 - Issues identified in the study which relate to risk and liability are addressed in the building consent review



3. Addressing strategic business conduct

- Promote compliance with provisions of the Commerce Act prohibiting anti-competitive conduct
 - Discouraging the use of quantity-forcing supplier-to-merchant rebates that may harm competition
 - Supporting compliance with misuse of market power provisions under the Commerce Act
 - Supporting compliance with laws relating to the use of restrictive covenants and exclusive leases
- Further consider the economy wide use of restrictive land covenants and exclusive leases

Voice of the industry

- Submissions on draft report due by **4pm Thursday 1 September 2022**
- Consultation conference in the week of **Monday 26 September 2022** to inform the final report:
 - to test the preliminary findings and draft recommendations with interested parties
 - clarify comments received on the draft report.
- Have your say – final report due on **6 December 2022**, for consideration by Government



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