

# **Commerce Amendment Bill**

Government Bill

As reported from the Economic Development, Science and Innovation  
Committee

## **Commentary**

### **Recommendation**

The Economic Development, Science and Innovation Committee has examined the Commerce Amendment Bill and recommends that it be passed with the amendments shown.

### **Introduction**

The bill seeks to amend the Commerce Act 1986 so it can better fulfil its purpose of promoting competition. In particular, the bill would strengthen the prohibition against misuse of market power in section 36 of the Act. It would also make other changes to improve the way the Act works.

The bill seeks to address problems with how the section 36 provisions are interpreted and applied. At present, the provisions:

- may fail to deter or penalise some forms of anti-competitive conduct
- can be costly and complex to enforce, which reduces incentives for businesses to comply
- can be unpredictable in their application to business conduct.

The bill would replace the current test in section 36 that focuses on whether a company's conduct "takes advantage of" its substantial market power. Instead, conduct would be linked to its purpose, effects, or likely effects. The bill would prohibit people with substantial market power from engaging in conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market.

Other proposed changes in the bill include:

- removing provisions in the Act that exempt some conduct involving intellectual property rights from prohibitions against anti-competitive conduct
- aligning the rules relating to prohibitions of cartel behaviour in covenants with those in contracts
- clarifying how the Act applies to interests in land
- increasing the maximum penalties for anti-competitive business acquisitions and mergers so they align with penalties relating to anti-competitive agreements
- increasing the maximum number of Commerce Commission members from 6 to 8
- expressly empowering the Commerce Commission to share information with other government agencies or regulators in certain situations.

### **Legislative scrutiny**

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

### **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

### **Aligning rules for trans-Tasman markets**

Section 36 of the Act prohibits misuse of market power in New Zealand markets. Clause 14 of the bill would amend section 36 to strengthen and clarify this prohibition.

We believe the same changes should also be applied to section 36A. Section 36A has similar prohibitions against Australian or trans-Tasman firms, with substantial market power, taking advantage of that power in a New Zealand market. As introduced, the bill would not make any changes to section 36A.

We recommend that the test in section 36A be changed so that it is consistent with the proposed changes to the section 36 test. If section 36A is not amended, we are concerned it would create a double standard based on where the firm has substantial market power. This could result in a firm based in Australia being treated more leniently than firms based in New Zealand, for identical conduct affecting New Zealand markets. We therefore recommend amending clause 14 of the bill to replace section 36A so that it is consistent with the proposed changes to section 36.

To give effect to this we also propose various consequential amendments, including to clause 5 and the insertion of a new clause 5A.

### **Aligning rules relating to covenants and contracts**

Section 30 of the Act prohibits people from entering into a contract that contains a cartel provision, or giving effect to a cartel provision. Under section 82B of the Act, it is a criminal offence to contravene section 30 with the intention of engaging in cartel conduct. Section 82B came into force in April 2021.

One of the purposes of the bill is to ensure that cartel provisions in covenants are prohibited in the same way as cartel provisions in contracts are. Clauses 9 and 10 of the bill, as introduced, would amend sections 30 and 30A of the Act so that it also prohibited giving, requiring the giving of, or giving effect to a covenant that contained a cartel provision.

The criminal offence in section 82B came into force after this bill was introduced. We recommend inserting clause 27A into the bill to make section 82B apply to the changes proposed in clauses 9 and 10. That is, it would be a criminal offence to contravene the bill's prohibition on cartel provisions in covenants.

### **Changes to the Commerce Commission's authorisation powers**

In some instances, anti-competitive conduct might be in the public interest. An example might be where competing businesses work together to aid in dealing with the effects of COVID-19. In these instances, it may be desirable to allow that behaviour even though it might otherwise contravene the Act.

Section 58 of the Act allows the Commerce Commission to grant authorisation for conduct that is otherwise likely to contravene the Act. Under section 61, the Commission must be satisfied that the conduct is likely to result in a net benefit to the public interest. We propose some amendments, discussed below, to improve administration of the authorisation scheme.

#### **Provisional approval powers**

At present, after a person makes an application for authorisation under section 58, the Commission must issue a determination within 120 working days (or longer by agreement with the applicant) stating whether the application is approved or declined. Until a determination is made, if the conduct breaches a restrictive trade practice it would be unlawful.

However, there may be situations where the need for authorisation is time sensitive. Recognising this, the COVID-19 Response (Further Management Measures) Legislation Act 2020 created a temporary ability for the Commerce Commission to issue "provisional authorisation" to an applicant. That ability will cease six months after the Epidemic Preparedness (COVID-19) Notice 2020 expires.

We believe that the changes made by the COVID-19 legislation should be made permanent. COVID-19 has demonstrated that there may be compelling public interest reasons to authorise conduct before the full procedure for deciding an application can be completed. Making this permanent would improve the Act's administration.

We therefore recommend inserting clause 23A to the bill to make permanent the power to issue a provisional authorisation. This clause would add a new section 65AAA to the Act, allowing the Commission to grant interim authorisation while it undertakes the full process for determining an application.

### **Expanding the scope of the authorisation powers**

As the Act stands, section 58 allows the Commission to authorise trade practices that would otherwise contravene section 27 (prohibiting anti-competitive agreements), section 28 (prohibiting anti-competitive covenants), or sections 37 and 38 (prohibiting resale price maintenance).

Clause 19 of the bill, as introduced, would amend section 58 to expand the Commission's powers to authorise any conduct covered by the proposed new section 36. We agree with this expansion. As discussed above, we believe that conduct under section 36A should be treated the same as conduct under section 36. We therefore believe that section 58 should also apply to section 36A.

We also believe there may be examples of situations where a cartel provision may be in the public interest. Should such a situation arise, it would be important that the Commission's authorisation powers extended to conduct that would otherwise contravene any prohibition on cartel conduct.

We therefore recommend amending clause 19, section 58 of the Act. Our changes would give the Commission the power to authorise conduct prohibited by section 36A and directly authorise any of the cartel conduct prohibited by section 30.

### **Changes to transitional provisions**

As introduced, the bill would allow long lead times before certain provisions took effect. We recommend some changes to reduce these lead times.

### **Implementation timeline for repealing section 45**

Section 45 of the Act provides certain exceptions to conduct involving intellectual property (IP) rights. Clause 15 of the bill would repeal section 45. In the bill as introduced, clause 15 would take effect 12 months after the bill received Royal assent. The delayed commencement is to allow time for the Commerce Commission to produce guidelines to assist affected parties.

Repealing this exception might mean that some existing agreements would then be prohibited if they are anti-competitive. If an anti-competitive agreement involving IP rights had been negotiated in reliance on the exception provided by section 45, the value of the agreement might be reduced if section 45 were repealed. If the bill is passed, it is possible that some existing agreements relating to IP rights may need to be renegotiated. To account for this, the bill would allow existing agreements to continue relying on the section 45 exception, for a transitional period, after its repeal.

The bill's Schedule would insert several clauses into Schedule 1AA of the Act. Clause 13 of the bill's Schedule, as introduced, would create a 3-year transitional period. Clause 18 of the Schedule would allow any agreements entered into before

section 45 was repealed to continue to rely on the section 45 exception during the 3-year transitional period.

Clause 18 would come into force one year after the bill received Royal assent, and the 3-year transitional period for affected agreements would begin on that date. Consequently, the bill as introduced might not influence existing anti-competitive agreements relating to IP rights for four years after the bill received Royal assent.

We believe this period is too long. We think a total of two years would be sufficient for existing IP agreements to be adjusted as necessary. We are concerned that people might take advantage of the 12-month period before section 45 would be repealed and enter into a new IP rights agreement that was anti-competitive. They would then benefit from anti-competitive aspects of the agreement being unaffected until the end of the 3-year transitional period.

We therefore recommend amending clauses 13 and 18 of the bill's Schedule to reduce the transitional period from 3 years to 1 year.

### **Implementation timeline for prohibition on cartel provisions in covenants**

The bill's commencement clause proposes that the prohibition on cartel provisions in covenants would come into force one year after the bill received Royal assent. Clause 15 of the bill's Schedule would also apply the 3-year transitional period to existing covenants which contain a cartel provision.

For the same reasons discussed above, we believe this four-year lead time is too long. Parties bound by existing covenants would need to cease giving effect to any cartel provisions in the covenant, or have the covenant removed under the Property Law Act 2007. However, we believe that the timeframe for effecting this change should be the same as for agreements affected by the repeal of section 45.

We recommend that our proposal to reduce the transitional period from 3 years to 1 year should also apply to these provisions. Consequently, we recommend amending clause 15 of the bill's Schedule for this purpose.

### **New maximum penalty under section 83**

Clause 28 of the bill would amend section 83 of the Act to increase the maximum penalty for anti-competitive acquisitions and mergers. In the bill as introduced, this increase would come into force 12 months after the bill received Royal assent. We do not believe a 12-month lead time is necessary. The increase in the maximum penalty would not affect liability for actions taken before the amendment came into force. This means that a delay would only benefit people engaging in anti-competitive acquisitions or mergers in the 12 months after the bill was passed.

We recommend amending the commencement provisions in clause 2 so that clause 28 would instead come into force one month after the bill received Royal assent.

### **Commerce Commission should prepare guidance**

We believe it is important that people understand clearly how the bill's changes would affect them. The bill's delayed commencement dates would give time for people to

become familiar with the new requirements and ensure they are compliant before the changes came into effect.

The Commerce Commission is New Zealand's competition authority and regulator. One of its functions is to provide information about the purposes and provisions of the Commerce Act. We would expect the Commission to release timely and detailed guidance to help market participants understand the provisions in the bill. Guidance might also outline how the Commission intends to enforce the provisions. It would be especially important for explaining how people might be affected by the proposed changes to the section 36 and 36A test, and the repeal of section 45.

We are satisfied with the Commission's assurance that it intends to do this.

### **New Zealand National Party differing view**

This bill amends the Commerce Act 1986. The two key provisions are the changes to an effects-based test under section 36 and the repeal of intellectual property safe harbours. National remains concerned about the effect on pro-competitive behaviour that these changes could have, and the potential for resulting detrimental outcomes for consumers.

#### **Section 36**

The bill changes competition rules for dominant market players from an intention to be anti-competitive to business decisions that have the unintended consequence of altering competition in a market. The National Party believes this test should be amended from "intent (purpose), effect, or likely effect" to be anti-competitive to "intent (purpose) or likely effect". Removal of the "effect" condition limits the restrictions to foreseeable consequences of commercial actions. As drafted, firms with market power risk liability for unforeseeable future consequences, leading to overly-conservative decision making on their part. This is likely to deter competitive conduct, to the detriment of consumers in the long term. The regulatory impact assessment prepared by MBIE supports this view.

#### **Legitimate business justification**

A legitimate business justification defence should be included in Section 36 of the bill, consistent with international precedent. While the Commerce Commission has assured us that they will not pursue proceedings against standard commercial conduct, this should be specified in the bill. The Commission may not bring proceedings against legitimate businesses; this does not preclude third parties from doing so.

#### **Intellectual property safe harbours**

National opposes the repeal of intellectual property safe harbours proposed in this bill. Businesses require confidence to invest in and license their IP. Intellectual property rights have no intrinsic value. Rather, the value lies in the statutory rights that allow for the enforcement of IP. Repealing certain safe harbours in this bill will make New Zealand an outlier internationally, discourage investment in IP and R&D, and

have a chilling effect on pro-competitive licensing of intellectual property to competitors and other third parties.

## **Appendix**

### **Committee process**

The Commerce Amendment Bill was referred to the committee on 16 March 2021.

The closing date for submissions on the bill was 30 April 2021. We received and considered 30 submissions from interested groups and individuals. We heard oral evidence from 11 submitters.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

### **Committee membership**

Jamie Strange (Chairperson)

Glen Bennett

Naisi Chen

Melissa Lee

Hon Todd McClay



**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted unanimously

~~text deleted unanimously~~



*Hon Dr David Clark*

## **Commerce Amendment Bill**

Government Bill

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**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Commerce Amendment Act **2021**.

**2 Commencement**

(1AAA) **Section 23B** commences on the day after Royal assent.

- (1) **Sections 4(1), (3), (4), (6), (8), and (9), 7, 8, 17, 18, 22(7), 23A, 23C, 28, and 31 to 37** commence 1 month after Royal assent.
- (2) **Section 38(1)** commences 6 months after Royal assent.
- (3) The rest of this Act commences on the first anniversary of Royal assent.

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### 3 Principal Act

This Act amends the Commerce Act 1986 (the **principal Act**).

#### Part 1 Amendments to principal Act

- |          |   |    |
|----------|---|----|
| <b>4</b> | <b>Section 2 amended (Interpretation)</b>   | 5  |
| (1)      | <p>In section 2(1), insert in their appropriate alphabetical order:</p> <p><b>overseas regulator</b> means an overseas body that has competition law functions corresponding to those of the Commission under this Act</p> <p><b>public service agency</b> means any of the agencies listed in section 10(a) of the Public Service Act 2020</p> | 10 |
| (2)      | <p>In section 2(1), insert in its appropriate alphabetical order:</p> <p><b>substantial</b> means real or of substance, except in—</p> <p>(a) <del>section 36 and 36A</del> <b>sections 36 and 36A</b> when referring to a degree of power in a market; and</p> <p>(b) section 47(3) and (4); and</p> <p>(c) Part 4</p>                         | 15 |
| (3)      | <p>In section 2(1), definition of <b>acquire</b>, paragraph (c), after “to”, insert “goods or services that are”.</p>   |    |
| (4)      | <p>In section 2(1), definition of <b>business</b>, replace paragraph (b) with:</p> <p>(b) in the course of which goods or services are acquired or supplied otherwise than free of charge</p>   | 20 |
| (5)      | <p>In section 2(1), definition of <b>give effect to</b>, replace “or understanding” with “understanding, or covenant”.</p>  |    |
| (6)      | <p>In section 2(1), definition of <b>price</b>, delete “or the acquisition or disposition of any interest in land”.</p>   | 25 |
| (7)      | <p>In section 2(1), replace the definition of <b>provision</b> with:</p> <p><b>provision</b>,—</p> <p>(a) in relation to a covenant, means a term of the covenant; and</p> <p>(b) in relation to an understanding or arrangement, means any matter forming part of or relating to the understanding or arrangement</p>                          | 30 |
| (8)      | <p>In section 2(1), replace the definition of <b>supply</b> with:</p> <p><b>supply</b>,—</p> <p>(a) in relation to goods, includes supply (or resupply) by way of gift, sale, exchange, lease, hire, or hire purchase; and</p> <p>(b) in relation to services, includes provide, grant, or confer; and</p>                                      | 35 |

- (c) in relation to goods or services that are interests in land, includes disposition
- (9) In section 2(1), definition of **trade**, delete “or to the disposition or acquisition of any interest in land”.
- (10) Repeal section 2(1A). 5
- (11) In section 2(2)(a)(iii), after “or the giving of,”, insert “or the giving effect to a provision of,”.
- (12) In section 2(2)(b)(iii), after “or the giving of,”, insert “or the giving effect to a provision of,”.
- (13) After section 2(6)(c), insert: 10
- (d) a reference to a party to a covenant means a person who—
- (i) is bound by, or entitled to the benefit of, the covenant; or
- (ii) would be bound by, or entitled to the benefit of, the covenant if not for section 28(4) or 30C.
- (14) In section 2(8)(a), after “arrived at”, insert “, or covenant given or required to be given,”. 15
- (15) In section 2(9), replace “or understanding” with “understanding, or covenant” in each place.
- 5 Section 3 amended (Certain terms defined in relation to competition)**
- (1) In section 3(1A), replace “the reference in section 36A(2)(b) and (c)” with “in section 36A”. 20
- (2) Repeal section 3(1B) and (1C).
- (3) In section 3(7), replace “and 28” with “, 28, ~~and 36,~~ and **36A**”.
- 5A Section 6A amended (Special provisions relating to application of Act to the Crown in right of Australia and to Australian Crown corporations)** 25
- (1) In section 6A, replace “Section 36A, and Parts 6 and 7, in so far as they relate to a contravention of, or confer powers that may be exercised in relation to, that section,” with “The provisions referred to in **subsection (2)**”.
- (2) In section 6A, insert as subsection (2):
- (2) For the purposes of **subsection (1)**, the provisions are— 30
- (a) **section 36A**; and
- (b) Part 5, in so far as it relates to **section 36A**; and
- (c) Schedule 1AA, in so far as it relates to **section 36A**; and
- (d) Parts 6 and 7, in so far as they relate to a contravention of, or confer powers that may be exercised in relation to,— 35
- (i) **section 36A**; or

	(ii) <u>Part 5 or Schedule 1AA (in so far as that Part or that schedule relates to <b>section 36A</b>).</u>	
<b>6</b>	<b>Section 7 amended (Law relating to restraint of trade and breaches of confidence not affected)</b>	
(1)	Replace the heading of <u>section 7</u> with “ <b>Relationship with law on restraint of trade</b> ”.	5
(2)	Repeal section 7(2).	
(3)	In section 7(3), delete “or subsection (2)”.	
<b>7</b>	<b>Section 9 amended (Membership of Commission)</b>	
(1)	In section 9(1), replace “no more than 6” with “no more than 8”.	10
(2)	In section 9(2), replace “no more than 5” with “no more than 7”.	
<b>8</b>	<b>Section 13 amended (Termination of appointment of members)</b>	
	After section 13(5), insert:	
(6)	To avoid doubt, a former member who is deemed to continue as a member under subsection (4) is not a member for the purposes of determining the number of members under section 9(1) or (2).	15
<b>8A</b>	<b><u>Cross-heading above section 27 replaced</u></b>	
	Replace the cross-heading above section 27 with:	
	<i><u>Contracts, arrangements, understandings, or covenants substantially lessening competition</u></i>	20
<b>8B</b>	<b><u>Section 28 amended (Covenants substantially lessening competition prohibited)</u></b>	
	<u>In section 28(6), replace “Where” with “For the purposes of this section, where”.</u>	
<b>9</b>	<b>Section 30 amended (Prohibition on entering into or giving effect to cartel provision)</b>	25
(1)	<u>Replace the heading to section 30 with “<b>Contracts, arrangements, understandings, or covenants containing cartel provisions prohibited</b>”.</u>	
(2)	After section 30(1)(a), insert:	
(ab)	give, or require the giving of, a covenant that contains a cartel provision; or	30
<b>10</b>	<b>Section 30A amended (Meaning of cartel provision and related terms)</b>	
	In section 30A, replace “or understanding” with “understanding, or covenant” in each place.	



<b>11</b>	<b>Section 30B amended (Additional interpretation relating to cartel provisions)</b>	
	In section 30B(a), replace “or understanding” with “understanding, or covenant” in each place.	
<b>12</b>	<b>Section 30C amended (Cartel provisions generally unenforceable)</b>	5
	Replace section 30C(2) with:	
(2)	However, nothing in subsection (1) affects the enforceability of a cartel provision in—	
(a)	a contract or covenant to which section <del>33</del> <u>31</u> applies; or	
(b)	a contract to which section <del>31, 32, 33, 44A(4) or (5), or 44B</del> applies.	10
<b>13</b>	<b>Section 31 amended (Exception for collaborative activity)</b>	
(1)	After section 31(1), insert:	
	<i>Exception for giving, or requiring the giving of, covenant containing cartel provision</i>	
(1A)	Nothing in <b>section 30(1)(ab)</b> applies to a person in relation to a cartel provision if, at the time of giving, or requiring the giving of, a covenant that contains the provision,—	15
(a)	the person and 1 or more other parties to the covenant are involved in a collaborative activity; and	
(b)	the cartel provision is reasonably necessary for the purpose of the collaborative activity.	20
(2)	In section 31(2)(a), replace “or understanding” with “understanding, or covenant”.	
(3)	In section 31(3)(a), replace “or understanding” with “understanding, or covenant”.	25
<b>14</b>	<b><del>Section 36</del> Sections 36 and 36A and cross-heading above section 36 replaced</b>	
	Replace <del>section 36</del> <u>sections 36 and 36A</u> and the cross-heading above section 36 with:	
	<i>Misuse of market power</i>	30
<b>36</b>	<b>Misuse of market power</b>	
(1)	A person that has a substantial degree of power in a market must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in—	
(a)	that market; or	
(b)	any other market in which the person, or an interconnected person,—	35

- (i) supplies or acquires, or is likely to supply or acquire, goods or services; or
- (ii) supplies or acquires, or is likely to supply or acquire, goods or services indirectly through 1 or more other persons.
- (2) In this section, a person has a **substantial degree of power in a market** if— 5
- (a) the person has a substantial degree of power in the market; or
- (b) the person, together with 1 or more interconnected persons, has a substantial degree of power in the market; or
- (c) 1 or more interconnected persons of the person have a substantial degree of power in the market; or 10
- (d) 2 or more interconnected persons together have a substantial degree of power in the market.
- Compare: Competition and Consumer Act 2010 s 46 (Aust)
- 36A Misuse of market power in trans-Tasman markets**
- (1) **Subsection (2)** applies if 1 or more of the following applies to a person: 15
- (a) the person has a substantial degree of power in a market in New Zealand;
- (b) the person has a substantial degree of power in a market in Australia;
- (c) the person has a substantial degree of power in a market in New Zealand and Australia. 20
- (2) The person must not engage in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in—
- (a) a market in New Zealand in which the person has a substantial degree of power (if any) and that is not a market exclusively for services; or
- (b) any other market in New Zealand, not being a market exclusively for services, in which the person, or an interconnected person,— 25
- (i) supplies or acquires, or is likely to supply or acquire, goods or services; or
- (ii) supplies or acquires, or is likely to supply or acquire, goods or services indirectly through 1 or more other persons. 30
- (3) In this section, a person has a **substantial degree of power in a market** if—
- (a) the person has a substantial degree of power in the market; or
- (b) the person, together with 1 or more interconnected persons, has a substantial degree of power in the market; or
- (c) 1 or more interconnected persons of the person have a substantial degree of power in the market; or 35
- (d) 2 or more interconnected persons together have a substantial degree of power in the market.

- (4) In this section, **market** means a market for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them.
- (5) **Section 36A** does not limit **section 36**.  
Compare: Competition and Consumer Act 2010 s 46A (Aust) 5
- 14A Section 44A amended (Exceptions in relation to international liner shipping services)**  
In section 44A(8), insert in its appropriate alphabetical order:  
**cartel provision** means a cartel provision in a contract, arrangement, or understanding 10
- 14B Section 44B amended (Further exception in relation to international liner shipping services (price fixing in relation to space on ship))**  
After section 44B(4), insert:
- (5) In this section, **cartel provision** means a cartel provision in a contract, arrangement, or understanding. 15
- 15 Section 45 repealed (Exceptions in relation to intellectual property rights)**  
Repeal section 45.
- 16 Section 46 amended (Saving in respect of business acquisitions)**
- (1) Replace section 46(a) with:
- (a) to any of the following to the extent that the contract, arrangement, understanding, or covenant provides for the acquisition or disposition of assets of a business or shares: 20
- (i) entering into a contract or an arrangement:
- (ii) arriving at an understanding:
- (iii) giving, or requiring the giving of, a covenant; or 25
- (2) In section 46(b), replace “or understanding” with “understanding, or covenant”.
- 17 Section 48 amended (Interpretation)**  
In section 48, repeal the definition of **department**.
- 18 Section 51A amended (Competition study terms of reference)**  
In section 51A, replace “departments” with “public service agencies” in each place. 30
- 19 Section 58 amended (Commission may grant authorisation for restrictive trade practices)**  
After section 58(4), insert:

- (56A) A person who wishes to engage in conduct to which that person considers **section 36** or **36A** would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to engage in that conduct.
- (6B) A person who wishes to enter into a contract or an arrangement, or arrive at an understanding, that contains, or might contain, a cartel provision may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to enter into the contract or arrangement, or arrive at the understanding. 5
- (6C) A person who wishes to give, or require the giving of, a covenant that contains, or might contain, a cartel provision may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to give, or require the giving of, the covenant. 10
- (6D) A person who wishes to give effect to a provision of a contract, arrangement, understanding, or covenant that is, or might be, a cartel provision may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to give effect to that provision. 15

## 20 Section 58A amended (Effect of authorisation)

- (1) In section 58A(1) and (2), replace “or 30C” with “30C, ~~or 36,~~ or **36A**”.
- (2) In section 58A(3), replace “subsection (3) of section 58 remains in force, nothing in section 28 shall prevent” with “section 58(3) remains in force, nothing in section 28, 30, 30C, ~~or 36,~~ or **36A** prevents”. 20
- (3) In section 58A(4), replace “subsection (4) of section 58 remains in force, nothing in section 28 shall prevent” with “section 58(4) remains in force, nothing in section 28, 30, 30C, ~~or 36,~~ or **36A** prevents”. 25
- (4) After section 58A(4), insert:
- (4A) While an authorisation under ~~section 58(5)~~**section 58(6A)** remains in force, nothing in section 27, 28, 30, 30C, ~~36, 36A,~~ 37, or 38 prevents an applicant from engaging in conduct to which the authorisation relates in accordance with the authorisation. 30
- (4B) While an authorisation under **section 58(6B)** remains in force, nothing in section 27, 30, 30C, **36,** or **36A** prevents an applicant from—
- (a) entering into the contract or arrangement, or arriving at the understanding, to which the authorisation relates; or
- (b) in accordance with the authorisation, giving effect to any cartel provision in the contract, arrangement, or understanding to which the authorisation relates. 35
- (4C) While an authorisation under **section 58(6C)** remains in force, nothing in section 28, 30, 30C, **36,** or **36A** prevents an applicant from—

- (a) giving, or requiring the giving of, the covenant to which the authorisation relates; or
- (b) giving effect to any cartel provision of the covenant to which the authorisation relates in accordance with the authorisation.
- (4D) While an authorisation under **section 58(6D)** remains in force, nothing in section 27, 28, 30, 30C, **36**, or **36A** prevents an applicant from giving effect to any cartel provision of the contract, arrangement, understanding, or covenant to which the authorisation relates in accordance with the authorisation. 5
- (5) In section 58A(5), replace “subsection (7) of section 58 remains in force, nothing in section 37 shall prevent” with “section 58(7) remains in force, nothing in **section 36, 36A**, or 37 prevents”. 10
- (6) In section 58A(6), replace “subsection (8) of section 58 remains in force, nothing in section 38 shall prevent” with “section 58(8) remains in force, nothing in **section 36, 36A**, or 38 prevents”.
- 21 Section 58B amended (Additional provisions relating to authorisations)** 15
- (1) After section 58B(1)(d), insert:
- (da) engage in conduct to which that person considers **section 36** would apply or might apply; or
- (2) In section 58B(1), replace “practice or act” with “conduct, practice, or act”.
- 21 Section 58B amended (Additional provisions relating to authorisations)** 20
- (1) Replace section 58B(1) with:
- (1) An authorisation granted to a person under section 58 has effect as if it were also an authorisation in the same terms to every other person named or referred to in the application for the authorisation as—
- (a) a party to the contract, arrangement, understanding, conduct, practice, or act to which the application relates; or 25
- (b) a person who is or would be bound by, or entitled to the benefit of, the covenant to which the application relates.
- (2) In section 58B(2)(b), replace “or understanding” with “understanding, or covenant” in each place. 30
- 22 Section 59 amended (Contracts or covenants subject to authorisation not prohibited under certain conditions)**
- (1) In section 59(1)(a), after “section 27”, insert “or 30(1)(a) **36**” in each place.
- (1A) After section 59(1)(a), insert:
- (aa) a contract the entry into which is, or the giving effect to a provision of which would be, conduct to which **section 36 or 36A** applies may be entered into if the requirements of subsection (2) are complied with: 35
- (2) In section 59(1)(b), after “section 28”, insert “or **30(1)(ab) 36**” in each place.

- (3) After section 59(1)(b), insert:
- (c) a covenant the requiring of the giving of which, or the giving of which, is conduct to which **section 36 or 36A** applies may be required to be given, or may be given, if the requirements of subsection (2) are complied with. 5
- (4) In section 59(2)(a), replace “to which section 27 applies” with “described in subsection (1)(a)”.
- (5) After section 59(2)(a), insert:
- (aa) in the case of a contract described in **subsection (1)(aa)**, that the contract is subject to a condition that the contract does not come into force unless and until authorisation is granted to engage in the conduct to which **section 36 or 36A** applies and that an application must be made for that authorisation within 15 working days after the contract is entered into: 10
- (6) In section 59(2)(b),— 15
- (a) replace “to which section 28 applies” with “described in subsection (1)(b) or (c)”; and
- (b) after “to it”, insert “, or to engage in the conduct to which **section 36 or 36A** applies, as the case may be,”.
- (7) After section 59(2), insert: 20
- (3) The condition referred to in subsection (2)(a) or (b) may provide for the provision to come into force, or the covenant to have effect, as the case may be, on the basis of an interim authorisation being granted under **section 65AAA**, but only if the condition also provides for the provision or covenant to cease to have effect immediately if— 25
- (a) the interim authorisation ceases to be in force; and
- (b) the authorisation under section 58 has not been granted.
- (8) Replace **section 59(3)** (as inserted by **subsection (7)**) with:
- (3) The condition referred to in subsection (2)(a), **(aa)**, or (b) may provide for the provision or the contract to come into force, or the covenant to have effect, as the case may be, on the basis of an interim authorisation being granted under **section 65AAA**, but only if the condition also provides for the provision, contract, or covenant to cease to have effect immediately if— 30
- (a) the interim authorisation ceases to be in force; and
- (b) the authorisation under section 58 has not been granted. 35
- 22A Section 59A amended (When Commission may grant authorisation)**
- In section 59A(1)(b), after “arrived at,”, insert “or a covenant given,”.

**23 Section 61 amended (Determination of applications for authorisation of restrictive trade practices)**

- (1) ~~In section 61(6), replace “(4)” with “(5)”.~~
- (1) In section 61, replace “shall” with “must” in each place.
- (1A) In section 61(6), replace “pursuant to an application under section 58(1) to (4)” with “relating to an application under section 58(1) to **(6A)**”. 5
- (2) In section 61(6)(d), replace “covenant—” with “covenant; or”.
- (3) After section 61(6)(d), insert:
  - (e) engaging in the conduct—
- (4) Replace section 61(8) with: 10
- (8) The Commission must not make a determination granting an authorisation relating to an application under **section 58(6B)** to (8) unless it is satisfied that the following matter to which the application relates will in all the circumstances result, or be likely to result, in such a benefit to the public that the matter should be permitted: 15
  - (a) entry into the contract or arrangement, or arriving at the understanding:
  - (b) giving, or requiring the giving of, the covenant:
  - (c) giving effect to the provision of the contract, arrangement, understanding, or covenant:
  - (d) engaging in the practice of resale price maintenance: 20
  - (e) the act or conduct.
- (9) For the purposes of **section 58(6B) to (6D)** and **subsection (8)(a) to (c)**, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision, providing there are reasonable grounds for believing that it might be. 25

**23A New section 65AAA inserted (Commission may grant interim authorisation)**

After section 65, insert:

**65AAA Commission may grant interim authorisation**

- (1) The Commission may make a determination in writing granting an interim authorisation for an application under section 58 if the Commission considers it is appropriate to do so. 30
- (2) The Commission is not required to comply with section 61(5) to **(9)** before granting an interim authorisation.
- (3) For the purposes of this section, a reference in any of sections 58A, 58B, 59A, 59B, 61(2), 65, 92, 104, 105, and 106(10) to an authorisation must be treated as if it were a reference to an interim authorisation. 35
- (4) An interim authorisation remains in force until—

- (a) the applicant withdraws its application for an authorisation; or  
 (b) the Commission revokes the interim authorisation under section 65; or  
 (c) the Commission declines or grants the application for an authorisation under section 58.
- (5) **Subsection (4)** does not limit the Commission’s ability to grant an interim authorisation for such period as the Commission sees fit. 5

**23B Section 65AA amended (Applications during epidemic period)**

Replace section 65AA(1)(b) with:

- (b) ending at the earlier of the following:
- (i) the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked; 10
- (ii) the date on which **section 19** of the Commerce Amendment Act **2021** (which amends section 58) comes into force.

**23C Section 65AD amended (Provisional authorisations for certain applications made during epidemic period)** 15

- (1) In section 65AD(4), delete “59(1)(a) and (2)(a),”.
- (2) After section 65AD(4), insert:
- (4A) If **section 23C(1)** of the Commerce Amendment Act **2021** amends subsection (4) of this section during the epidemic period,— 20
- (a) subsection (4), as in force before that amendment was made, continues to apply for the purposes of this section (as if that amendment had not been made) in respect of contracts to which section 59(1)(a) of this Act applies that are entered into before **section 23C(1)** of the Commerce Amendment Act **2021** came into force (and, for the purposes of this paragraph, **section 59(3)** of this Act is disregarded); 25
- (b) in respect of contracts to which section 59(1)(a) of this Act applies that are entered into on or after **section 23C(1)** of the Commerce Amendment Act **2021** came into force, **section 59(3)** of this Act applies for the purposes of this section as if the reference to— 30
- (i) an interim authorisation granted under **section 65AAA** is a reference to a provisional authorisation granted under this section; and
- (ii) an authorisation under section 58 includes a reference to an authorisation under section 65AA.

**24 Section 65A amended (Commission may give clearances relating to cartel provisions)** 35

- (1) Replace section 65A(1) with:



- (1) A person who proposes to do any of the following may apply to the Commission for a clearance under this section:
- (a) enter into a contract or an arrangement that contains, or may contain, a cartel provision:
  - (b) arrive at an understanding that contains, or may contain, a cartel provision: 5
  - (c) give, or require the giving of, a covenant that contains, or may contain, a cartel provision.
- (2) In section 65A(2)(a) and (b), replace “or understanding” with “understanding, or covenant”. 10
- (3) Replace section 65A(2)(c) with:
- (c) the following will not have, or would not be likely to have, the effect of substantially lessening competition in a market:
    - (i) entering into the contract or arrangement:
    - (ii) arriving at the understanding: 15
    - (iii) giving, or requiring the giving of, the covenant:
    - (iv) giving effect to any provision of the contract, arrangement, understanding, or covenant.
- 25 Section 65B amended (Effect of clearance under section 65A)**
- (1) In section 65B, replace “or understanding” with “understanding, or covenant” in each place. 20
- (2) In section 65B, replace “or 30” with “, 28, 30, ~~or 36~~, or **36A**” in each place.
- (3) In section 65B(a), after “the understanding”, insert “, or giving, or requiring the giving of, the covenant”.
- 26 Section 69 amended (Effect of clearance or authorisation)** 25
- In section 69, after “27,”, insert “**36**, 36A.”.
- 27 Section 80C amended (Court may order certain persons to be excluded from management of body corporate)**
- (1) After section 80C(a), insert:
- (ab) given, or required the giving of, a covenant that contains a cartel provision; or 30
- (2) In section 80C(b), replace “or understanding” with “understanding, or covenant”.
- 27A Section 82B amended (Offence relating to cartel prohibition)**
- (1) After section 82B(1)(a), insert: 35
- (ab) the person,—

- (i) in contravention of **section 30(1)(ab)**, gives, or requires the giving of, a covenant that contains a cartel provision; and
- (ii) intends, at the time the person gives or requires the giving of the covenant, to engage in price fixing, restricting output, or market allocating; or 5
- (2) In section 82B(4), after “section 30(1)(a)”, insert “, **(ab)**.”.
- 28 Section 83 amended (Pecuniary penalties relating to business acquisitions)**
- (1) Repeal section 83(1A).
- (2) In section 83(2), replace “shall” with “must”.
- (3) After section 83(2), insert: 10
- (3) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—
- (a) in the case of an individual, \$500,000; or
- (b) in any other case, the greater of the following: 15
- (i) \$10 million:
- (ii) either,—
- (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or 20
- (B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.
- 29 Section 89 amended (Other orders)** 25
- In section 89(3), replace “person who, but for section 28(4) would be bound by or entitled to the benefit of” with “party to” in each place.
- 30 Section 92 amended (Persons entitled to appeal)**
- In section 92(ba)(ii), replace “or understanding” with “understanding, or covenant”. 30
- 31 New cross-heading above section 98 inserted**
- Before section 98, insert:
- Powers relating to evidence*
- 32 New sections 99AA and 99AB and cross-headings inserted**
- After section 99, insert: 35

*Power to share information and documents with public service agencies, statutory entities, and Reserve Bank*

**99AA Sharing of information and documents with public service agencies, statutory entities, and Reserve Bank**

- (1) The Commission may provide to a public service agency, a statutory entity, or the Reserve Bank of New Zealand any information, or a copy of any document, that the Commission—
  - (a) holds in relation to the performance or exercise of the Commission’s functions, powers, or duties under this Act or any other legislation; and
  - (b) considers may assist the public service agency, statutory entity, or Reserve Bank in the performance or exercise of its functions, powers, or duties under this Act or any other legislation.
- (2) The Commission may provide information, or a copy of a document, under this section only if the Commission is satisfied that—
  - (a) doing so will not substantially affect the performance of its other functions; and
  - (b) appropriate protections are or will be in place for the purpose of maintaining the confidentiality of anything provided (in particular, information that is personal information within the meaning of the Privacy Act 2020).
- (3) The Commission may use any information, or a copy of any document, in the Commission’s performance or exercise of its functions, powers, or duties under any legislation if the information or copy is provided to the Commission—
  - (a) by a public service agency or statutory entity, or the Reserve Bank, under any legislation; or
  - (b) by an overseas regulator.
- (4) In this section and **section 99AB**, **statutory entity** means an entity or office named in Schedule 1 of the Crown Entities Act 2004.
- (5) This section applies despite anything to the contrary in any contract, deed, or document.
- (6) Nothing in this section limits the Privacy Act 2020 or section 29 of the Fuel Industry Act 2020.

**99AB Commission may impose conditions on provision of information or documents**

- (1) The Commission may impose any conditions in relation to providing information, or a copy of a document, to a public service agency, ~~or a statutory entity,~~ or the Reserve Bank of New Zealand (whether provided in compliance with a request or otherwise).

- (2) The Commission must, in considering what conditions to impose, have regard to whether conditions are necessary or desirable in order to protect the privacy of any individual.
- (3) The conditions may include, without limitation, conditions relating to—
- (a) maintaining the confidentiality of anything provided (in particular, information that is personal information within the meaning of the Privacy Act 2020): 5
  - (b) the storing of, the use of, or access to anything provided:
  - (c) the copying, returning, or disposing of copies of documents provided:
  - (d) payment of the costs incurred by the Commission in providing anything or in generally complying with a request. 10
- (4) This section does not limit section 100.

*Assistance to overseas regulators*

- 33 Section 99C amended (Definitions of terms used in sections 99B to 99P)**  
In section 99C, repeal the definition of **overseas regulator**. 15

- 34 New cross-heading above section 100 inserted**  
After section 99P, insert:

*Offences, regulations, and administrative provisions*

**Part 2**

**Transitional, related, and consequential amendments** 20

**35 Consequential amendment to Fair Trading Act 1986**

- (1) This section amends the Fair Trading Act 1986.
- (2) Repeal section 48A.

**36 Consequential amendment to Takeovers Act 1993**

- (1) This section amends the Takeovers Act 1993. 25
- (2) In section 15B(2), replace “section 48A of the Fair Trading Act 1986” with “**section 99AA** of the Commerce Act 1986”.

**37 Consequential amendment to Fuel Industry Act 2020**

- (1) This section amends the Fuel Industry Act 2020.
- (2) In section 29(5), after “Privacy Act 2020”, insert “or **section 99AA** of the Commerce Act 1986”. 30

**38 Schedule 1AA amended**

- (1AAA) In Schedule 1AA, clause 12, insert as subclause (2):

- 
- (2) **Subclause (1)** applies on and after section 65AE repeals sections 65AA to 65AD. If the epidemic period, as defined in section 65AA(1), ends on the date on which **section 19** of the Commerce Amendment Act **2021** comes into force, *see clause 20*.
- (1) In Schedule 1AA, after Part 3, insert the **Part 4** set out in **Part 1 of the Schedule** of this Act. 5
- (2) In Schedule 1AA, after clause 14 (as inserted by **subsection (1)**), insert the **clauses 15 to ~~23~~ 24** set out in **Part 2 of the Schedule** of this Act.

**Schedule**  
**New Part 4 inserted into Schedule 1AA**

**s 38(1), (2)**

**Part 1**

**Transitional provisions that come into force 6 months after Royal assent** 5

**Part 4**

**Provisions relating to Commerce Amendment Act 2021**

**13 Interpretation**

(1) In this Part,— 10

**3-year-1-year transitional period** means the period that starts on the commencement date and ends at the close of the ~~third~~ first anniversary of the commencement date

**Amendment Act** means the Commerce Amendment Act **2021**

**commencement date** means the first anniversary of Royal assent for the Amendment Act. 15

(2) In this Part,—

(a) a reference to a section or Part (for example, **section 36**) is a reference to that section as in force on and from the commencement date; and

(b) a reference to a former section or Part (for example, former Part 2) is a reference to that section or Part as in force immediately before the commencement date. 20

**14 Authorisation under ~~new section 58(5)~~ new section 58(6A) to (6D) may be granted before that section comes into force**

(1) This clause applies— 25

(a) before the commencement date; but

(b) as if sections 30, 36, 36A, 58(5), 58(6A) to (6D), 58B, 59, 59A, and 61 were in force.

(2) A person may apply to the Commission under ~~section 58(5)~~ section 58(6A) to (6D) for an authorisation relating to ~~section 36~~. 30

(3) The Commission may grant the authorisation.

(4) Sections 58B, 59, 59A, and 61 apply in relation to an application made under this clause.

(5) An authorisation granted under this clause may only take effect on or after the commencement date. 35

## Part 2

### Transitional provisions that come into force on first anniversary of Royal assent

<b>15</b>	<b>Application of cartel prohibition to covenants in force before commencement date</b>	5
	During the <del>3-year</del> <u>1-year</u> transitional period, nothing in section 30(1)(b) applies in relation to a covenant that is given, or required to be given, before the commencement date.	
<b>16</b>	<b>Application of <del>section 36</del> <b>sections 36 and 36A</b> to contracts, arrangements, understandings, and covenants in force before commencement date</b>	10
	<del>Section 36</del> <b>Sections 36 and 36A</b> apply to conduct that gives effect to a contract, arrangement, understanding, or covenant whether—	
	(a) the contract or arrangement was entered into before, on, or after the commencement date; or	15
	(b) the understanding was arrived at before, on, or after the commencement date; or	
	(c) the covenant was given, or required to be given, before, on, or after the commencement date.	
<b>17</b>	<b>Conduct authorised before <del>section 36</del> <b>sections 36 and 36A</b> replaced continues to be authorised</b>	20
(1)	Nothing in <b>section 36 or 36A</b> applies to any conduct—	
	(a) to which former Part 2 applied; and	
	(b) that, before the commencement date, was authorised under the former Part 5.	25
(2)	Nothing in <b>section 36 or 36A</b> applies to any conduct—	
	(a) to which former Part 2 applied; and	
	(b) in respect of which an application for an authorisation under the former Part 5 was—	
	(i) made before the commencement date; and	30
	(ii) approved on or after the commencement date.	
(3)	<i>See former <del>section 36(1)</del> <b>sections 36(1) and 36A(1)</b>.</i>	

<b>18</b>	<b>Application of former section 45 to existing statutory intellectual property rights</b>	
	Despite its repeal, former section 45(1)(b) continues to apply during the 3-year 1-year transitional period in relation to a contract, arrangement, or understanding that was—	5
	(a) described in former section 45(1)(a); and	
	(b) entered into, or arrived at, before the commencement date.	
<b>19</b>	<b>Sections 58A, 58B, and 59 apply to existing authorisations</b>	
	Sections 58A, 58B, and 59 apply to an authorisation granted by the Commission under former section 58 before the commencement date.	10
<b>20</b>	<b><u>Savings provisions if epidemic period under sections 65AA to 65AD ended by Amendment Act</u></b>	
(1)	<u>This clause applies if the epidemic period, as defined in section 65AA(1), ends on the date on which <b>section 19</b> of the Amendment Act comes into force (<i>see section 65AA(1)(b)(ii)</i>).</u>	15
(2)	<u>If this clause applies, it applies in relation to the following applications for an authorisation that are made on or after the date on which the epidemic period ends but before the close of the 6-month period that starts on the date on which the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked:</u>	
	(a) <u>an application for an authorisation under section 58(1), (2), or <b>(6B)</b>:</u>	20
	(b) <u>an application for an authorisation under <b>section 58(6D)</b> that relates to giving effect to a provision of a contract, arrangement, or understanding that is, or may be, a cartel provision.</u>	
(3)	<u>Despite section 60(1), the Commission may, in its discretion, waive all or part of any fee payable for the application.</u>	25
(4)	<u>Despite section 61(5), the Commission may, in its discretion, determine the application without complying with section 62.</u>	
<b>21</b>	<b>Section 65B applies to existing clearances</b>	
	Section 65B applies to a clearance given by the Commission under former section 65A before the commencement date.	30
<b>22</b>	<b>Section 69 applies to existing clearances and authorisations</b>	
	Section 69 applies in relation to a clearance or an authorisation whether the clearance was given, or the authorisation was granted, before, on, or after the commencement date.	



- 23 Court may make order in relation to covenant only if given on or after commencement date**  
Section 80C applies to a covenant only if the covenant is given, or required to be given, on or after the commencement date.
- 24 Offence under section 82B(1)(b) does not apply in relation to covenants given before commencement date** 5  
Section 82B(1)(b) does not apply to a person who gives effect to a cartel provision in a covenant given, or required to be given, before the commencement date.

### Legislative history

10 March 2021  
16 March 2021

Introduction (Bill 9–1)  
First reading and referral to Economic Development, Science and Innovation Committee