

Legislative statement: Commerce Amendment Bill First Reading

Overview

The Commerce Amendment Bill (**the Bill**) amends the Commerce Act 1986 (**the Act**) to improve the reach and functioning of competition law consistent with the Act's purpose of promoting competition in markets for the long-term benefit of consumers within New Zealand. The Bill does this by:

- strengthening the Act's section 36 prohibition against misuse of market power
- empowering the Commerce Commission to authorise conduct that may contravene the section 36 prohibition but which is in the public interest
- repealing safe harbours in the Act for intellectual property
- making a number of technical changes.

Strengthening the section 36 prohibition against misuse of market power

Section 36 aims to prevent firms with substantial market power from undertaking certain conduct that increases or extends their market power in a way that limits the benefits to consumers and the economy associated with competition. Anti-competitive conduct by dominant firms can lead to higher prices, lower quality goods and services, and weak incentives for investment and innovation.

The Bill amends section 36 to better target this prohibition directly at the anti-competitive impact of a firm's conduct in the market. Liability under this section would no longer be confined to cases where the firm has 'taken advantage' of its substantial market power and where its conduct was undertaken for an exclusionary purpose. Rather, firms with substantial market power would be prohibited from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition.

This change is expected to reduce the cost and complexity of enforcement and improve the deterrent value of the prohibition. It will also align section 36 with the equivalent prohibition in Australian competition law, on which the Act is more broadly based.

The Bill does not propose any changes to the sanctions or remedies available, including pecuniary penalties, for contravention of section 36.

Authorisation for certain conduct that may contravene the section 36 prohibition

The Bill would allow parties to seek authorisation from the Commerce Commission for conduct that may technically contravene section 36, but which is in the public interest. The current authorisation process does not extend to conduct captured under section 36. This change recognises that, in exceptional cases, some contravening conduct may be desirable because the firm can identify wider public benefits that exceed the costs.

Repeal of provisions that exempt some activities relating to intellectual property

The Act contains three provisions that protect certain intellectual property arrangements from scrutiny under competition law, even if those arrangements harm competition. These partial exemptions, or 'safe harbours', are proposed for repeal by the Bill. They reflect an outdated

understanding that intellectual property rights and competition law are generally incompatible by their very nature.

Intellectual property policy and competition policy both seek to enhance economic and consumer welfare by promoting innovation. The exclusivity or limited monopoly granted by an intellectual property right is generally unlikely to raise concerns of a kind competition law is intended to address. The right is typically much narrower than the market for the product or service that is relevant to competition law. The availability of close substitutes and competitive pressure ensures that intellectual property rights holders, including inventors, typically do not have enduring market power.

However, there are cases where intellectual property-related conduct could lead to a lessening of competition. The Bill would ensure that anti-competitive conduct involving intellectual property is able to be examined on the same basis as conduct involving other forms of property. For example, if conduct contravenes the prohibitions against cartels and anti-competitive agreements, the Act would no longer treat it differently just because the conduct involves licensing of intellectual property.

The repeal of these provisions would not come into force until 12 months after the Bill is passed. This is intended to enable businesses to assess their compliance with the Act and enable the Commerce Commission to develop guidance on how it will approach intellectual property arrangements. Once in force, the repeal would not apply retrospectively, but would affect actions done prospectively under existing contracts or arrangements. The Bill proposes a three year transition period to allow businesses to assess whether their contracts or activities comply with the Act as a result of the repeal of the safe harbour in section 45.

Technical changes to improve the functioning of competition law

The Bill makes several other amendments to the Act to improve its operation:

- It closes a loophole inadvertently created in 2017 by extending the prohibition against cartels to covenants that create or implement a cartel (as well as contracts that do so).
- It clarifies that the Act's prohibitions against collusion or exclusionary conduct apply to rights or interests in land, in the same way they apply to other kinds of property exchanged in trade. This is a clarification only and does not extend the scope of the Act.
- It aligns the maximum pecuniary penalties that can be imposed for anti-competitive mergers and acquisitions with those that can be imposed for other forms of anti-competitive conduct.
- It provides flexibility to appoint between four and eight full Commissioners (rather than between four and six) to reflect an extension of the Commerce Commission's functions over time.
- It establishes mechanisms for the Commerce Commission to share information it holds in relation to its statutory functions with other government agencies or regulators, subject to safeguards relating to the use and storage of that information. The Privacy Act 2020 would continue to apply.