

Legislative statement: Commerce Amendment Bill Third 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
- repealing safe harbours in the Act for certain conduct involving intellectual property
- increasing the range of situations in which the Commerce Commission can authorise conduct which is in the public interest but likely to contravene Part 2 of the Act
- making a number of other changes to improve the functioning of the Act.

Changes relating to the section 36 prohibition against misuse of market power

Section 36 aims to prevent firms with substantial market power from maintaining or extending their market power through conduct that impairs the ability of rivals to compete on their merits. This conduct by dominant firms can lead to higher prices, lower quality goods and services, and weak incentives for investment and innovation.

The Bill replaces section 36 to better target this prohibition directly at the anti-competitive impact of a firm's conduct in the market. Firms with substantial market power would be prohibited from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition – a test that is used elsewhere in the Commerce Act and in the equivalent prohibition in the Australian Competition and Consumer Act 2010.

These reforms are expected to make the prohibition more effective at deterring firms with substantial market power from actions contrary to the Act's purpose of promoting competition in markets.

The Bill as amended after being examined by the Economic Development, Science and Innovation Committee makes the equivalent reforms to the prohibition in section 36A against misuse of market power in trans-Tasman markets.

New sections 36 and 36A come into force 12 months after the Bill receives Royal assent, by which time the Commerce Commission is expected to have published detailed guidelines to assist parties in applying them.

Repeal of safe harbours for certain conduct relating to intellectual property

The Act contains three provisions that appear to protect certain intellectual property arrangements from scrutiny under competition law, even if those arrangements harm competition. The Bill would repeal these partial exceptions, or 'safe harbours'. They reflect an outdated understanding that intellectual property rights are, by their very nature, incompatible with the aims of competition law.

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. An intellectual property right tends to provide its owner with the confidence to invest in the development and distribution of products or

services beneficial to the economy and to consumers. The right is typically much narrower than the actual or potential market being serviced by the owner of the right, leaving room for competition *in that market*. Even where the intellectual property right facilitates substantial market power in the short-term, this will tend to produce competition *for the market*. By that process the original right holder may be displaced by a rival who has developed superior technologies or offerings.

However, there are cases where conduct involving intellectual property could substantially harm competition. It is not safe to assume in every case that conduct is pro-competitive or benign simply because it involves intellectual property. By removing these safe harbours, the Bill would ensure anti-competitive conduct involving intellectual property is able to be examined on the same basis as conduct involving other forms of property.

These safe harbours will remain available until 12 months after the Bill receives Royal assent. Provisions in agreements to which section 45 applies will be unaffected by the repeal of that section for an additional 12 months after repeal to ensure parties to those agreements are able to make any adjustments necessary to comply with the Part 2 of the Act. The Commerce Commission is expected to produce (or amend) guidelines that support interested parties to understand the effect of these repeals.

Making authorisation possible for all restrictive trade practices and on an interim basis

The Bill as introduced would extend the availability of authorisation to conduct that is in the public interest despite being likely, otherwise, to contravene section 36. The Bill now being read a third time does this also for conduct likely to contravene section 36A and for conduct likely to contravene the cartel prohibition in section 30 (directly, rather than as an agreement prohibited by section 27 or a covenant prohibited by section 28). The result is that authorisation can be given for practically any conduct that would otherwise be prohibited by Part 2 of the Act (restrictive trade practices).

On the recommendation of the Economic Development, Science and Innovation Committee, the Bill entrenches the possibility of the Commerce Commission granting interim authorisation while it assesses an application for authorisation proper. The Commerce Commission would be permanently empowered to grant interim authorisation where it considers this appropriate. This might be, for example, where the conduct subject to the application appears necessary to avert an imminent risk of harm to the public interest.

The Commission has previously published guidelines setting out its approach to these decisions under the temporary provisions of the COVID-19 Response (Further Management Measures) Legislation Act 2020.

Other changes to improve the functioning of competition law

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

- It extends the prohibition against cartels to covenants that create or implement a cartel (restoring the pre-2017 position that the prohibition is not limited to agreements). This includes the cartel offence in section 82B, but only in relation to covenants entered into after section 27A of the Bill comes into force. The Bill provides a further 12 month transitional for existing covenants affected by these changes.
- It provides statutory authority for the Commerce Commission to exchange information with other government agencies or regulators, including the New Zealand Police, to support the

performance of statutory duties and functions, subject to safeguards relating to the use and storage of that information.

- 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.