

Departmental Disclosure Statement

Commerce Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment (MBIE).

MBIE certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

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Contents

Contents..... 2

Part One: General Policy Statement 3

Part Two: Background Material and Policy Information 5

Part Three: Testing of Legislative Content..... 9

Part Four: Significant Legislative Features 12

Part One: General Policy Statement

Introduction

This Bill amends the Commerce Act 1986 (the Act) to strengthen the prohibition against misuse of market power (section 36) and make other changes to improve the functioning of the Act.

Section 36 (misuse of market power)

Section 36 of the Act prohibits persons with substantial market power from taking advantage of that power for an anti-competitive purpose. This is New Zealand's anti-monopolisation prohibition. It is not unlawful in New Zealand to be the sole supplier (or acquirer) in a market for goods or services or to hold substantial market power. Rather, persons that hold substantial market power must not use that power for anti-competitive purposes. Effectively, this prohibition seeks to prevent firms with market power from harming the competitive process by maintaining or extending their market power in a way that limits the ability of other firms to compete, and in turn reduces the benefits to consumers and the economy associated with competition.

Examples of conduct that may be covered by this prohibition include exclusive dealing, refusal to supply, or predatory pricing. When this conduct is carried out by a firm with market power it can lead to higher prices, lower quality goods and services, and weak incentives for investment and innovation.

The Bill is informed by a review that identified 3 main problems with the operation of this prohibition as follows:

- it has the potential to fail to deter or penalise some forms of anti-competitive conduct:
- it is costly and complex to enforce, which reduces the incentives for businesses to comply with the law:
- it creates some unpredictability as to its application to business conduct.

To address these concerns, the Bill amends section 36 to make explicit that conduct by persons with substantial market power that has the purpose, effect, or likely effect of substantially lessening competition in markets is prohibited. This change aligns the prohibition with the equivalent prohibition in Australian competition law, on which the Commerce Act is based. On application, the Commerce Commission is also empowered to grant authorisation for conduct to which section 36 would or might apply if that conduct is in the public interest.

Repeal of safe harbours for intellectual property

The Act contains 3 provisions that effectively provide safe harbours for certain intellectual property rights from specified prohibitions in the Act. These provisions, which are unclear in scope and untested in the courts, are repealed in the Bill. This amendment reflects an increasing acceptance that intellectual property rights and competition law are generally complementary, with both seeking to encourage innovation and provide long-term benefits for consumers. However, in the unusual circumstance that conduct or arrangements relating to intellectual property rights harm competition, this should be assessed under the Act in the same manner as other property.

Other matters

The Bill also provides for a range of matters to improve the functioning of the Act. These include:

- providing that cartel provisions in covenants are to be treated the same as those in contracts:
- clarifying the application of the Act to interests in land:
- increasing the maximum pecuniary penalties for anti-competitive business acquisitions to align with those relating to anti-competitive agreements:
- increasing the maximum number of Commerce Commission members from 6 to 8:
- providing that the Commerce Commission may share information that it holds in relation to its functions under the Act, or any other Act that it enforces, with other public service agencies or statutory entities, subject to safeguards.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>In November 2015, MBIE initiated a targeted review of the Commerce Act 1986, which included an initial assessment of the effectiveness of section 36 of that Act, which prohibits firms from taking advantage of their market power, and whether it should be amended. A copy of the consultation document, submissions and resulting Cabinet paper are available on MBIE's website here: https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/targeted-review-of-the-commerce-act-2015/</p> <p>In January 2019, following consideration of submissions and further analysis, MBIE released a discussion document outlining options for reform of section 36 for consultation. In addition, MBIE sought submissions on two other issues covered by this Bill related to:</p> <ul style="list-style-type: none">• the intellectual property safe harbours in the Commerce Act• the treatment of covenants under the Act. <p>A copy of the consultation document, submissions and resulting Cabinet policy decisions are available on MBIE's website here: https://www.mbie.govt.nz/business-and-employment/business/competition-regulation-and-policy/reviews-of-the-commerce-act-1986/review-of-section-36-of-the-commerce-act-and-other-matters/</p> <p>Other key reports that informed the policy to be given effect by this Bill are:</p> <ul style="list-style-type: none">• New Zealand Productivity Commission, Boosting productivity in the services sector: Final Report, May 2014 (accessible at https://www.productivity.govt.nz/inquiries/boosting-services-sector-productivity/)• Australian Competition Policy Review, Independent Panel (Chaired by Professor Ian Harper). The final report was released on 31 March 2015. Documents related to the review and the Australian Government's response are available here: https://treasury.gov.au/review/competition-policy-review.	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
<p>New Zealand is not bound by an international treaty in relation to the matters in this Bill. In 2009, however, the then Prime Ministers of Australia and New Zealand released a joint statement, and single economic market outcomes framework, outlining their commitment to regulatory harmonisation and alignment between the two jurisdictions to stimulate business and create jobs. Key documents outlining the principles for trans-Tasman coordination of business law (including competition law) are outlined in the following documents:</p> <ul style="list-style-type: none"> • Joint Statement by Prime Ministers Rudd and Key, 21 August 2009 (accessible here: https://www.beehive.govt.nz/release/joint-statement-prime-ministers-rudd-and-key). • Memorandum of Understanding between the Government of New Zealand and the Government of Australia on the Coordination of Business Law, dated 23 June 2010, (accessible here: https://www.dfat.gov.au/trade/agreements/in-force/anzcerta/Pages/memorandum-of-understanding-between-the-government-of-new-zealand-and-the-government-of-australia-on-the-coordination-of-bu). • Article 4 of the Protocol to the Australia New Zealand Closer Economic Relations Trade Agreement on Acceleration of Free Trade in Goods, dated 18 August 1988 (accessible here: https://www.treaties.mfat.govt.nz/search/details/t/47/). 	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The following regulatory impact statements (RISs) informed the policy decisions:</p> <ul style="list-style-type: none"> • Review of section 36 of the Commerce Act and other matters, MBIE, 12 February 2020 (accessible here: https://www.mbie.govt.nz/dmsdocument/11262-impact-statement-review-of-section-36-of-the-commerce-act-and-other-matters-proactiverelase-pdf). • RIS (process options): Targeted Review of the Commerce Act 1986: section 36 and the taking advantage of market power, MBIE, 16 March 2017 (accessible here: https://www.mbie.govt.nz/assets/dd9d1ef637/ris-section-36-commerce-act.pdf). <p>Some of the policy decisions were exempt from the Cabinet requirement to provide a RIS as they have no or only minor impacts on businesses, individuals or not-for-profit entities. These policies were in relation to treatment of covenants, clarifying provisions in relation to land, increasing pecuniary penalties for anti-competitive business acquisitions, raising the cap on the number of members of the Commerce Commission and facilitating information-sharing by the Commerce Commission with other domestic regulators.</p>	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
<p>Only the RIS (process options), dated 16 March 2017, met the threshold for receiving an independent opinion on the quality of the RIS from the RIA Team based in Treasury. They provided the following opinion:</p> <p>Given the RIS's transparency about the incomplete state of evidence, and the fact that further work is proposed, RIAT considered that the RIS meets the quality assurance criteria.</p>	

2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	N/A
<p>The RIS used to inform Cabinet policy decisions, dated 17 February 2020, included a high level (largely qualitative) assessment of the potential costs and benefits of reform of section 36 of the Act and the repeal of the intellectual property safe harbours. This is accessible here: https://www.mbie.govt.nz/dmsdocument/11262-impact-statement-review-of-section-36-of-the-commerce-act-and-other-matters-proactiverelase-pdf).</p>	
2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

The reform of section 36 and the repeal of the safe harbours for intellectual property may result in some uncertainty for businesses, particularly until new case law is developed. It is possible that this uncertainty could lead to some businesses acting overly conservatively and in a compliance-focused manner to avoid any risk of contravening the provisions of the Act. Some stakeholders referred to this as a “chilling effect”. However, the proposed reforms seek to address this risk by aligning the new provisions with the equivalent provisions of Australian competition law, and in the case of section 36, with other established prohibitions in the Commerce Act. This will enable businesses and their legal advisors to draw on comparative case law and familiar concepts to achieve compliance. A transitional period of 12 months is proposed to allow them to self-assess compliance, and thereafter, authorisation will be available from the Commerce Commission on application. The Commerce Commission is also expected to prepare guidelines on the new provisions and engage in advocacy efforts to educate businesses.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?
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MBIE has consulted the Ministry of Foreign Affairs and Trade. MBIE considers the Bill is consistent with New Zealand's international obligations.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

MBIE considers that the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?	YES
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The Ministry of Justice has been consulted. Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible here: https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES

<p>The following clauses in the Bill create or amend offences or civil pecuniary penalty regimes:</p> <ul style="list-style-type: none"> • Clause 9 – Section 30 (prohibition on entering into or giving effect to cartel provision) is amended to provide that covenants are treated in the same manner as contracts when they contain a cartel provision. Consequential amendments are also made in clauses 10 to 13. • Clause 14 – Section 36 (misuse of market power) is repealed and replaced to adopt a new prohibition for misuse of substantial market power. Contravening this section already attracts liability for pecuniary penalties under section 80. • Clause 28 – Section 83 (pecuniary penalties relating to business acquisitions) is amended to increase the maximum pecuniary penalties that may be imposed by the court for anti-competitive business acquisitions. <p>The following clause in the Bill amends the jurisdiction of a court:</p> <ul style="list-style-type: none"> • Clause 27 – Section 80C (court may order certain persons to be excluded from management of body corporate) is amended to extend the courts' existing power to ban certain persons from management positions for contravention of the cartel prohibition (section 30), so that the consequences of having an anti-competitive cartel provision in a covenant is the same as if it had been in a contract. 	
3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
MBIE consulted the Ministry of Justice as part of the policy development process on these provisions, and on the final Bill. The Ministry of Justice did not raise concerns.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	YES
<p>The following clauses in the Bill include provisions that have implications for personal information:</p> <ul style="list-style-type: none"> • Clause 32 – New section 99AA (sharing of information and documents with public service agencies, statutory entities, and Reserve Bank) allows the Commerce Commission to share information, which includes personal information, with other public service agencies, the Reserve Bank of New Zealand and statutory entities where the information may assist those agencies or entities in the performance or exercise of their statutory functions, powers or duties. Before sharing the information, the Commission must be satisfied that appropriate protections are or will be in place for the purpose of maintaining the confidentiality of the information provided (particularly personal information). Nothing in that section limits the Privacy Act 2020. • Clause 32 – Section 99AB (Commission may impose conditions on provision of information or documents) allows the Commission to impose conditions on the use of information that it is providing to agencies or entities. • Clauses 35 to 37 make consequential amendments to the Fair Trading Act 1986, Takeovers Act 1993 and Fuel Industry Act 200, so that the new general information sharing power for the Commission in clause 32 will supersede (or amend, as relevant) the existing information sharing powers in relation to the Commission in those Acts. 	

3.5.1. Was the Privacy Commissioner consulted about these provisions?	YES
<p>The Office of the Privacy Commissioner was consulted on these provisions. The Office sought assurance that the Privacy Act 2020 would continue to apply to personal information shared by the Commerce Commission under clause 32, section 99AA, including the tests for disclosing information under principle 11. We consider that this is the effect of subsection 99AA(6) providing that nothing limits the Privacy Act 2020.</p> <p>The Office of the Privacy Commissioner also outlined 'best practice' would involve the Commerce Commission notifying individuals when their personal information is shared to other agencies and reporting in its annual report the number of domestic disclosures made under this provision. It was the Office's preference that the Bill include provisions to this effect. However, we consider that compliance with the Privacy Act and the information principles is sufficient. We cannot see a clear basis for holding the Commerce Commission to a higher standard than other regulators, and the impact of such requirements is unclear, inconsistent with other information-sharing provisions for similar economic regulators, and could hinder information sharing that is in the public interest.</p>	

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The following external consultation occurred:</p> <ul style="list-style-type: none"> Three rounds of public consultation have taken place in relation to the reform of the prohibition in section 36 (misuse of market power). Consultation initially occurred following the release of an issues paper in 2015. In 2016, there was also a period for cross-submissions. The third round of public consultation was undertaken from 25 January to 1 April 2019, following the release of a discussion paper. This 2019 discussion paper also included proposals related to the removal of the safe harbours for intellectual property and the treatment of covenants. 29 written submissions were received. Officials held meetings with business and industry representatives, legal advisers, and the Commerce Commission. Further information is available in section 2.5 of the regulatory impact statement (accessible here: https://www.mbie.govt.nz/dmsdocument/11262-impact-statement-review-of-section-36-of-the-commerce-act-and-other-matters-proactiverelase-pdf). The following agencies and entities were consulted as part of the policy process or on the draft Commerce Amendment Bill: The Treasury, the Ministry of Justice, the Ministry of Foreign Affairs and Trade, the Ministry for Primary Industries, the Ministry of Transport, the Commerce Commission, and the Office of the Privacy Commissioner. <p>Public consultation has not occurred in relation to the minor technical changes in the Bill, as they largely relate to matters of government administration or clarification of matters in the Bill, having no or limited impacts on businesses or consumers.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	YES
<p>These changes were developed in close consultation with the Commerce Commission (the regulator under the Commerce Act) with the aim of ensuring that they are workable.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
<p>Clause 15 will repeal section 45 (Exceptions in relation to intellectual property rights), which is a safe harbour provision for intellectual property rights, currently making these exempt from the prohibition relating to cartels and anti-competitive agreements. The safe harbour in section 45 provides a protection against 'civil liability', which can be described as a 'civil immunity'. The change will allow anti-competitive intellectual property arrangements to be subject to an appropriate level of scrutiny, which ensures that the consumer benefits associated with competition law (such as lower prices and greater choice) are shared across the economy.</p>	

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>Clause 19 amends section 58 (Commission may grant authorisation for restrictive trade practices) to allow parties to apply for authorisation from the Commerce Commission to engage in conduct to which the new prohibition in section 36 (misuse of market power) might apply. There are consequential amendments in clauses 20 to 26 to provide for the Commerce Commission's process and the effect of authorisation. An authorisation may only be granted if the Commerce Commission is satisfied, in all the circumstances, that a benefit to the public would outweigh any lessening of competition that may result from the conduct. The authorisation procedure under the Act is well established, with rights of appeal and judicial review.</p>	

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p>Clause 38 amends Schedule 1AA (Transitional, related, and consequential amendments). There are two features to note:</p> <ul style="list-style-type: none">• The new Part 4 of Schedule 1AA empowers the Commerce Commission to accept and consider applications for authorisation during the transitional period before the new prohibition in section 36 comes into force. This provision will allow businesses time to seek authorisation for conduct which is in the public interest but which may contravene the new prohibition.• New sections 15 and 18 of Part 2 of Schedule 1AA deal with covenants and arrangements relating to intellectual property that were entered into before the commencement of the relevant provisions in the Bill. These provide that any actions to give effect to the anti-competitive provisions of an existing covenant or arrangement that occur on or after the commencement of the provisions in the Bill are subject to the prohibitions in the Act. A three year transitional period is provided in the Bill so that businesses can review these covenants and intellectual property arrangements, and amend if necessary, to ensure they are in compliance. No liability will attach to any actions that occurred before the commencement of the provisions.	