

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.

22 March 2018

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Part One: General Policy Statement

Introduction

This Bill amends the Commerce Act 1986 (the Act) to introduce a competition studies (market studies) regime, improve the effectiveness of the regulatory regime for airports under Part 4 of the Act and amends the alternative enforcement mechanisms available to the Commerce Commission (the Commission).

Policy to be given effect by the Bill

Competition studies

The Bill empowers the Commission to undertake studies into the competitive conditions relating to goods or service in a particular sector if it is in the public interest. The Commission may commence a study on its own initiative or at the direction of the Minister of Commerce and Consumer Affairs. These studies will be used to gain an insight into markets that may not be functioning well but where no breaches of the Act are apparent.

Airports

The Bill makes improvements to strengthen the regulatory regime for airports under Part 4 of the Act. Currently, the airports regulated under Part 4 are subject only to information disclosure regulation, but there is no specified process for imposing additional regulation if information disclosure regulation is found to be ineffective.

The Bill will make it clear that the Commission's 'summary and analysis' reports can comment on whether information disclosure is effective for a regulated supplier. It will also introduce a truncated inquiry process to investigate the need for further regulation of already-regulated airports, and clarify that, following such an inquiry changes to the type of regulation applying to those airports can be made through an Order in Council.

Alternative enforcement mechanisms

The Bill introduces an enforceable undertakings regime into the Act. These undertakings will be available for the Commission to accept in relation to the enforcement of the Act. The enforceable undertakings regime will complement existing arrangements in relation to settlements. If an enforceable undertaking is breached, the court may order compliance with the order or impose a financial penalty.

The Bill also repeals the existing cease and desist regime. This regime has rarely been used and offers no practical advantages over the Commission seeking an injunction from the court to restrain harmful anticompetitive conduct.

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>MBIE completed a targeted review of the Commerce Act in 2017. This review informed policy decisions that were made relating to competition studies and alternative enforcement mechanisms. Information on this review is available here: http://www.mbie.govt.nz/info-services/business/competition-policy/targeted-review-of-the-commerce-act.</p> <p>The amendments in relation to the economic regulation of airports followed a MBIE review of the effectiveness of airport regulation under Part 4. Information is available here: http://www.mbie.govt.nz/info-services/business/competition-policy/part-4-of-the-commerce-act/airport-regulation/effectiveness-information-disclosure-regulation</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
N/A	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The Ministry of Business, Innovation, and Employment produced three separate regulatory impact statements (RIS) on 9 March 2017, 16 March 2017, and 24 May 2017 to help inform the main policy decisions taken by the Government regarding the contents of this Bill.</p> <p>Copies of these regulatory impact statements can be found at:</p> <ul style="list-style-type: none">• Competition (market) studies: http://www.mbie.govt.nz/publications-research/publications/business-law/ris-market-studies.PDF• Alternative enforcement mechanisms: http://www.mbie.govt.nz/publications-research/publications/business-law/ris-alternative-enforcement.PDF• Economic regulation of airports: http://www.mbie.govt.nz/info-services/business/competition-policy/part-4-of-the-commerce-act/airport-regulation/effectiveness-information-disclosure-regulation• Treasury website: http://www.treasury.govt.nz/publications/informationreleases/ris	

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>The Treasury RIA team reviewed the regulatory impact statement for market studies. The reviewers considered that the information and analysis summarised in the document meet the RIA quality assurance criteria. The regulatory impact statement demonstrates that providing the Commerce Commission with full market studies powers will advance the overall outcome sought by competition policy in New Zealand (as reflected in the Commerce Act 1986), which is to promote the long-term benefit of consumers. However, it is difficult to quantitatively assess the costs and benefits of a market studies power in general. RIA suggested that, if this proposal is implemented, MBIE should be involved not only in responding to the recommendations following a particular market study, but also in formally assessing the costs and benefits arising from the procedure as a whole.</p> <p>The other two regulatory impact statements in relation to the airports changes and alternative enforcement mechanisms each received an independent review by MBIE's internal regulatory impact assessment panel. They considered that both regulatory impact statements met 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
N/A	

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
N/A	

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?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
N/A	

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?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
N/A	

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?

MBIE has consulted the Ministry of Foreign Affairs and Trade. It has confirmed 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 this policy 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

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 on the Ministry of Justice's website at:

<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

The Bill grants jurisdiction to the High Court in relation to the enforcement of enforceable undertakings.

The little used Cease and Desist regime is being repealed by this Bill. This includes changes to the appeal process for existing orders.

3.4.1. Was the Ministry of Justice consulted about these provisions?

YES

The Ministry of Justice was consulted during the BORA vetting of this Bill.

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?

NO

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
MBIE has consulted extensively with the Commerce Commission during the drafting of the Bill. As the regulator empowered by the Commerce Act, it was prudent to seek their views.	

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?	NO

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

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?	NO

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?	NO

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?	YES
Section 56K of the Bill provides for additional airport regulation to be imposed by the Governor-General through an Order in Council on the recommendation of the Minister of Commerce and Consumer Affairs.	

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?	NO
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