

Short-Form Departmental Disclosure Statement

Commerce (Cartels and Other Matters) Amendment Bill

A short-form disclosure statement for proposed government amendments to a Bill seeks to bring together in one place some selected information to support and enhance the Parliamentary and public scrutiny of those proposed amendments.

It highlights certain significant powers or features in the proposed amendments that might be of particular Parliamentary or public interest and warrant an explanation.

There was no original disclosure statement for the Commerce (Cartels and Other Matters) Amendment Bill ('the Bill'), because the requirement for disclosure statements did not exist when the Bill was introduced.

This disclosure statement was prepared by Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

3 July 2017

Significant Legislative Features

Offences, penalties and court jurisdictions

1. Do the proposed amendments create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalties)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
<p><i>Offences or penalties</i></p> <p>The consolidated Bill (including this SOP) creates, amends or removes the following offence or penalty provisions:</p> <ul style="list-style-type: none"> ▪ clause 6: repeals the prohibition in section 29 relating to exclusionary provisions ▪ clause 7: repeals and replaces sections 30 to 33 retargeting the civil prohibition for cartels and the three exceptions - collaborative activities, vertical supply contracts and joint buying ▪ clause 13B: amends section 79B to clarify the relationship between civil pecuniary penalty and criminal liability (as exists in Part 4 of the Commerce Act 1986 ('the Act')) ▪ clause 14: amends section 80 to clarify matters relating to pecuniary penalty for contraventions of Part 2 of the Act relating to restrictive trade practices ▪ clause 15: amends section 80A to target the prohibition on indemnities to circumstances where a pecuniary penalty has been imposed on the person for a cartel contravention ▪ clause 19: amends section 83 to introduce a pecuniary penalty for contravention of section 47B (court orders relating to overseas acquisitions) ▪ clause 22: amends section 103 to increase the fines and extend the limitation period for obstructing the Commerce Commission ▪ clause 26: inserts schedule 1AA which includes transitional matters for offences and contraventions. <p><i>Jurisdiction of the court</i></p> <p>The consolidated Bill (including this SOP) creates or amends the following provisions relating to the jurisdiction of the High Court:</p> <ul style="list-style-type: none"> ▪ clause 8: inserts sections 47A to 47D to provide for declarations and orders relating to acquisitions by overseas persons that substantially lessen competition in New Zealand ▪ clause 13A: amends section 78 to clarify when lay members sit with the High Court ▪ clause 16: consequentially amends section 80C relating to banning orders for cartel contravention ▪ clause 21: amends section 92 dealing with appeal rights for Commerce Commission determinations. 	

1.1. Was the Ministry of Justice consulted about these provisions?	YES
<p>The Ministry of Justice was consulted on the policy papers that sought decisions that are to be given effect to by the consolidated Bill (including this SOP). The Ministry of Justice also vetted the Bill against the Bill of Rights Act 1990.</p>	

Privacy issues

2. Do the proposed amendments create, amend, or remove any provisions relating to the collection storage, access to, correction of, use or disclosure of personal information?	NO
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Compulsory acquisition of private property

3. Do the proposed amendments contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4. Do the proposed amendments 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

5. Do the proposed amendments affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the burden of proof for offences

6. Do the proposed amendments:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for any offence or civil pecuniary penalty proceeding?	YES
<p><i>Reverse burden of proof</i></p> <p>Clause 14 of the Bill includes the new subsection 80(2C) which reverses the usual burden of proof for a civil pecuniary penalty proceeding. It places the onus on the defendant to show that one of the three exceptions (i.e. sections 31 to 33) to the cartel prohibition applies. This is justified as the three exceptions involve complex commercial matters that are within the particular business knowledge of the defendant (e.g. determining 'the dominant purpose' of the conduct or provision).</p>	

Civil or criminal immunity

7. Do the proposed amendments create or amend a civil or criminal immunity for any person?	YES
<p><i>Exception for international liner shipping</i></p> <p>Clause 7B inserts sections 44A and 44B, which introduce a targeted exception for specified international liner shipping activities. The effect of the exception is to confer immunity from the prohibitions in sections 27 and 30. This new targeted exception replaces the current exception in sections 44(2) and (3) of the Act (these are repealed by clause 23B). In addition, clauses 23A and 23C repeal the sector-specific arrangements in the Shipping Act 1987, and make international liner shipping subject to the Commerce Act over a two year transitional period.</p> <p>The new exception is targeted to provide that immunity is only conferred upon specified or ancillary activities undertaken as part of a cooperative arrangement between two or more carriers to provide international liner shipping services. This exception is desirable to give certainty to carriers for their operational activities, given that these arrangements are global in nature and that vessel sharing is common practice to achieve economies of scale. Safeguards against anticompetitive conduct include that the cooperation must improve the international liner shipping services supplied. In addition, price fixing in relation to services provided to owners or consignors of goods carried at sea will be subject to the Act.</p>	

Significant decision-making powers

8. Do the proposed amendments 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><i>Clearance or authorisation determinations by the Commerce Commission</i></p> <p>The consolidated Bill (including this SOP) creates or amends the following provisions relating to the power of the Commerce Commission to make a determination in relation to mergers or restrictive trade practices:</p> <ul style="list-style-type: none"> ▪ clause 10: repeals section 59A to better allow for authorisation of existing arrangements ▪ clauses 10A to 11: amend sections 60 to 62 to streamline the authorisation process ▪ clause 12: amends sections 65A to 65D to provide for clearance by the Commerce Commission for collaborative activities ▪ clause 13: amends section 66 to extend the statutory timeframes for clearance for mergers ▪ clause 21: amends section 92 relating to appeal rights for Commerce Commission determinations. <p>The Commerce Commission is an independent Crown entity, with established procedures for making clearance and authorisation determinations. A new clearance regime for collaborative activities is created to enable businesses to manage legal risk if they are uncertain as to how the Act applies to their transaction. Third party appeal rights relating to authorisations are strengthened so that they are no longer linked to participation in a Commerce Commission conference. Other amendments will assist to streamline the Commerce Commission's processes. Safeguards relating to these determinations include: clear statutory criteria for decision-making, the voluntary nature of clearances, obligations on the Commerce Commission to consult as part of an authorisation process, and rights of appeal and judicial review.</p>	

Powers to make delegated legislation

9. Do the proposed amendments 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
10. Do the proposed amendments create or amend any other powers to make delegated legislation?	YES
<p>Clause 22A amends section 108 of the Act providing for regulations. The amendments enable a consistent approach for prescribing when exemptions from, or refunds of, application fees payable to the Commerce Commission would apply. The regulations may be made by Order in Council. The existing safeguards in the Act will apply, including that the regulations will be subject to the Acts and Regulations Publication Act 1989, disallowance under the Regulations Disallowance Act 1989, and subject to review by the Regulations Review Committee under Standing Order 319.</p>	

Any other unusual provisions or features

11. Do the proposed amendments contain any provisions (other than those noted above) that are unusual or call for special comment?	YES
<p><i>Application of Act to cross border issues</i></p> <p>Clauses 5 and 8 of the Bill deal with jurisdictional matters to better target international cartels and overseas mergers that impact on New Zealand. In particular:</p> <ul style="list-style-type: none"> ▪ clause 5 clarifies that the Act applies to conduct that occurs partly outside New Zealand, if any act or omission forming part of the conduct occurs in New Zealand. This provision applies jurisdiction to international cartels in the same manner as the Crimes Act 1961 applies to international criminal conspiracies. It ensures an overseas person is not able to evade liability by directing unlawful conduct from outside of New Zealand. ▪ clause 5 also repeals subsection 4(3) of the Act, which has been criticised as it asserts jurisdiction over overseas mergers that affect a market in New Zealand, even though the merging parties do not carry on business in New Zealand. Clause 8 introduces a new regime that is more appropriately targeted at the New Zealand business of the overseas merging parties. If the overseas merger is likely to substantially lessen competition in a market in New Zealand, the court may make a declaration to that effect and make orders against the New Zealand business. This is based on a similar regime in section 50A of the Australian Competition and Consumer Act 2010. <p><i>Attribution of conduct</i></p> <p>Clause 20 of the Bill amends and replaces section 90 of the Act dealing with attribution of conduct (or state of mind) of a director, employee, or agent of a body corporate to that body corporate. The Bill updates and extends this provision to attribute conduct carried out on behalf of a person, to that person, if the conduct is carried out at the direction of that person. It also clarifies that conduct that takes place inside New Zealand can be attributed to persons outside New Zealand in circumstances where the person outside New Zealand is directing the conduct inside New Zealand. The safeguard is that the attribution can only be made if the first person is acting within the scope of their actual or apparent authority.</p> <p><i>Search and seizure</i></p> <p>Clause 21A amends section 98 of the Act relating to the Commerce Commission's mandatory information gathering powers. The amendment addresses an issue raised in the Supreme Court case <i>AstraZeneca v Commerce Commission and Anor</i> [2009] NZSC 92. It makes clear that the Commerce Commission may exercise its powers under this section to investigate whether an exception or exemption from the Act applies to a person or a person's conduct. Safeguards include that the recipient of the notice has a defence for non-compliance with the notice if they have 'a reasonable excuse'.</p> <p><i>Criminal sanctions for cartels</i></p> <p>Note that the Bill as introduced included a criminal offence for cartels. This criminal offence has been removed from the consolidated Bill (including this SOP), and as such, is not addressed in this disclosure statement.</p>	