

Commerce (International Co-operation, and Fees) Amendment Bill

Government Bill

As reported from the committee of the whole
House

This bill was formerly part of the Commerce Commission (International Co-operation, and Fees) Bill as reported from the Commerce Committee. The committee of the whole House has further amended the bill and divided it into the following bills:

- this bill comprising clauses 1 and 2, subpart 1 of Part 1, and Part 2
 - Credit Contracts and Consumer Finance (International Co-operation) Amendment Bill comprising subpart 2 of Part 1
 - Fair Trading (International Co-operation) Amendment Bill comprising subpart 3 of Part 1
 - Telecommunications (International Co-operation) Amendment Bill comprising subpart 4 of Part 1.
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Hon Craig Foss

Commerce (International Co-operation, and Fees) Amendment Bill

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The Parliament of New Zealand enacts as follows:

1 Title
This Act is the Commerce (International Co-operation, and Fees) Amendment Act **2012**.

2 Commencement 5
This Act comes into force on the day after the date on which it receives the Royal assent.

**Part 1
Co-operation with overseas regulators**

Subpart 1—Amendments to Commerce Act 1986 10

4 Principal Act amended
This **subpart** amends the Commerce Act 1986.

5 Power to search 15
Section 98A is amended by adding the following subsection:
“(5) For the purpose of allowing the Commission to provide, under **section 99H**, compulsorily acquired information and

investigative assistance to a recognised overseas regulator, every reference in this section to a contravention of this Act must be taken to include a reference to a contravention of any foreign enactment that is identified (as required by **section 99F(1)(b)**) in the co-operation arrangement concerning that recognised overseas regulator.” 5

6 New sections 99B to 99O inserted

The following sections are inserted after section 99A:

“99B Purpose of sections 99C to 99O (which relate to assistance to overseas regulators) 10

The purpose of **sections 99C to 99O** is—

“(a) to provide for when and how the Commission may provide compulsorily acquired information and investigative assistance to overseas regulators; and

“(b) to clarify other matters relating to sharing other kinds of information with overseas regulators. 15

“99C Definitions of terms used in sections 99B to 99O

In **sections 99B to 99O**, unless the context otherwise requires,—

“**co-operation arrangement** means an arrangement concerning the Commission and an overseas regulator that is entered into under **section 99E** (a government-to-government co-operation arrangement) or **section 99EA** (a regulator-to-regulator co-operation arrangement) for— 20

“(a) the provision by the Commission of compulsorily acquired information and investigative assistance to the overseas regulator; and 25

“(b) the provision by the overseas regulator of information and investigative assistance to the Commission

“**compulsorily acquired information** means information that— 30

“(a) is acquired by the Commission, whether before or after this section comes into force, as a result of, or in relation to, the exercise by the Commission of any of its powers under section 98, 98A, or 98H, or any power incidental to those powers; and 35

“(b) is not in the public domain

“**investigative assistance** includes providing assistance by way of exercising any power of the Commission under, or in relation to, section 98, 98A, or 98H, and any powers incidental to those powers

“**overseas regulator** means an overseas body that has competition law functions corresponding to those of the Commission under this Act 5

“**recognised overseas regulator** means an overseas regulator that is the subject of a co-operation arrangement.

“**99D Restrictions on providing compulsorily acquired information and investigative assistance** 10

The Commission must not provide compulsorily acquired information or investigative assistance to an overseas regulator unless the information or assistance is provided—

“(a) to a recognised overseas regulator in accordance with a co-operation arrangement; and 15

“(b) in accordance with **sections 99H to 99J**.

“**99E Government-to-government co-operation arrangements**

“(1) The Minister may, on behalf of the Government of New Zealand, enter into a co-operation arrangement concerning an overseas regulator with— 20

“(a) the government of the country in which the overseas regulator is established; or

“(b) if the overseas regulator is established by an international body, the governing body of that international body. 25

“(2) Before entering into a co-operation arrangement concerning an overseas regulator, the Minister must—

“(a) have regard to the legal framework relating to the use of compulsorily acquired information in the jurisdiction of the overseas regulator; and 30

“(b) have regard to the potential consequences for New Zealand consumers and businesses of providing compulsorily acquired information or investigative assistance to the overseas regulator; and 35

- “(c) consult with the Privacy Commissioner on any privacy issues arising from the proposed co-operation arrangement.
- “(3) The Minister must not enter into a co-operation arrangement unless he or she is satisfied that entering into the arrangement is not inconsistent with any of New Zealand’s obligations under international agreements, conventions, or treaties. 5
- “99EA Regulator-to-regulator co-operation arrangements**
- “(1) The Commission may, with the prior written approval of the Minister, enter into a co-operation arrangement with an overseas regulator. 10
- “(2) The Minister may not give approval to a co-operation arrangement under this section unless the Minister—
- “(a) has had regard to the matters specified in **section 99E(2)(a) and (b)** and has consulted as specified in **section 99E(2)(c)**; and 15
- “(b) is satisfied of the matter specified in **section 99E(3)**.
- “99F Content of co-operation arrangements**
- “(1) Every co-operation arrangement must—
- “(a) identify the overseas regulator that it concerns; and 20
- “(b) identify the foreign enactments in connection with which the recognised overseas regulator may seek compulsorily acquired information and investigative assistance from the Commission; and
- “(c) set out how any compulsorily acquired information that is provided may be used by the overseas regulator, and how it is to be kept secure. 25
- “(2) A co-operation arrangement may also—
- “(a) provide for the reimbursement of the Commission for costs incurred in providing the information or assistance; and 30
- “(b) include other conditions on the provision of compulsorily acquired information or investigative assistance.

“99G Procedures relating to co-operation arrangements

“(1) Every co-operation arrangement must be in writing and be signed by,—

“(a) in the case of a government-to-government co-operation arrangement entered into under **section 99E**, the Minister and the person occupying, with respect to the overseas regulator, an equivalent position to that of the Minister, or any other person that the relevant government or governing body considers appropriate: 5

“(b) in the case of a regulator-to-regulator co-operation arrangement entered into under **section 99EA**, the chairperson of the Commission and the person occupying the equivalent position in relation to the overseas regulator. 10

“(2) No later than 15 working days after a co-operation arrangement is entered into,— 15

“(b) the Minister or the Commission, as appropriate, must publish a notice in the *Gazette* that—

“(i) states that the arrangement has been entered into; and

“(ii) identifies the overseas regulator concerned; and 20

“(iii) identifies the parties to the arrangement; and

“(iv) states when the arrangement comes into effect; and

“(c) the Commission must publish a copy of the co-operation arrangement on its Internet site, and must keep it there while the arrangement continues in force. 25

“(4) **Subsections (1) and (2)** apply with all necessary modifications to every amendment to a co-operation arrangement.

“99H Providing compulsorily acquired information and investigative assistance

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“(1) Following a request by a recognised overseas regulator made in accordance with a co-operation arrangement, the Commission may do either or both of the following:

“(a) provide compulsorily acquired information to the recognised overseas regulator: 35

“(b) provide investigative assistance to the recognised overseas regulator.

- “(2) Before providing compulsorily acquired information or investigative assistance under **subsection (1)**, the Commission must be satisfied that—
- “(a) providing the information or assistance will, or is likely to, assist the recognised overseas regulator in performing its functions or exercising its powers in relation to competition law; and 5
 - “(b) the provision of the information or assistance will not be inconsistent with the co-operation arrangement; and
 - “(c) the provision of the information or assistance will not significantly prejudice New Zealand’s international trade interests. 10
- “(2A) If the Commission considers, after consultation with the Ministry of Foreign Affairs and Trade, that a request for compulsorily acquired information or investigative assistance may have significant trade consequences for New Zealand, the Commission must refer the matter to the Minister of Trade. 15
- “(2B) If a request is referred to the Minister of Trade, the Commission is deemed to be satisfied for the purpose of **subsection (2)(c)** only if the Minister of Trade states, in writing, that he or she is satisfied that the provision of the information or assistance will not significantly prejudice New Zealand’s international trade interests. 20
- “(3) In considering whether to provide compulsorily acquired information or investigative assistance in accordance with a co-operation arrangement, the Commission must also consider— 25
- “(a) whether complying with the request will substantially affect the Commission’s ability to perform its other functions under this Act or any other enactment; and 30
 - “(b) whether the recognised overseas regulator could more conveniently obtain the information or assistance from another source; and
 - “(c) whether the request would, in the opinion of the Commission, be more appropriately dealt with under the Mutual Assistance in Criminal Matters Act 1992. 35

“99I Conditions on providing compulsorily acquired information and investigative assistance

- “(1) If the Commission provides compulsorily acquired information or investigative assistance to a recognised overseas regulator, the Commission may impose conditions on such provision, including conditions relating to— 5
- “(a) maintaining the confidentiality of information; and
 - “(b) the storage or use of, or access to, anything provided; and
 - “(c) the copying, returning, or disposal of copies of anything provided; and 10
 - “(d) the payment of costs incurred by the Commission in providing anything or in otherwise complying with a request for information or investigative assistance.
- “ (2) The Commission must not provide copies of statements made by any person in answer to a question put by or before the Commission that might tend to incriminate the person, unless the recognised overseas regulator gives a written undertaking— 15
- “(a) that it will not use such statements as evidence— 20
 - “(i) in criminal proceedings against the person (other than in proceedings in respect of the falsity of the person’s testimony); or
 - “(ii) in proceedings against the person for a pecuniary penalty or any equivalent proceedings; and 25
 - “(b) that, to the extent that it is within the ability of the overseas regulator to do so, it will ensure that such statements are not used by any other person, authority, or agency as evidence in proceedings referred to in **paragraph (a)**. 30

“99J Notice to persons affected by provision of information

- “ (1) If the Commission provides any compulsorily acquired information to a recognised overseas regulator, the Commission must, as soon as practicable after providing the information, notify the following people that the information has been provided: 35
- “(a) the person from whom the information was acquired:
 - “(b) every person to whom the information relates.

- “(2) However, the Commission need not notify a person as required by **subsection (1)** if—
- “(a) giving notice might compromise any investigation conducted, or to be conducted, by the Commission or any overseas regulator; or 5
 - “(b) giving notice would prejudice the maintenance of the law (including the prevention, investigation, and detection of offences, and the right to a fair trial) in New Zealand or elsewhere; or
 - “(c) it is not practicable in the circumstances to give notice to the person. 10
- “**99K Reporting on use of co-operation arrangements**
The Commission’s annual report must report on the use and operation of co-operation arrangements during the period covered by the report, and include information on— 15
- “(a) the number and general nature of requests for information and investigative assistance received from recognised overseas regulators; and
 - “(b) the number and general nature of requests for information and investigative assistance that the Commission has made to recognised overseas regulators. 20
- “**99L Sharing of non-compulsorily acquired information not affected**
Except to the extent that non-compulsorily acquired information is dealt with in a co-operation arrangement, the ability of the Commission to provide non-compulsorily acquired information to an overseas regulator is not affected by— 25
- “(a) **sections 99B to 99K**; or
 - “(b) whether or not the overseas regulator is a recognised overseas regulator. 30
- “**99M Information provided by consent**
Nothing in **sections 99B to 99K** or any co-operation arrangement prevents the Commission providing any information to an overseas regulator with the consent of the person who is the subject of the information. 35

“99N Part 4 information not to be provided

The Commission must not provide information to an overseas regulator that the Commission has obtained under, pursuant to, or for the purposes of Part 4, unless the information is already in the public domain.

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“99O Maintenance of privilege

“(1) If the Commission provides to an overseas regulator, for the purpose of assisting the overseas regulator to perform its competition law functions, a communication or information in respect of which the Commission has any privilege referred to in section 54, 56, or 57 of the Evidence Act 2006, the Commission is not to be taken as having waived its privilege in relation to that communication or information merely by providing it to the overseas regulator.

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“(2) If the Commission receives from an overseas regulator, for the purpose of assisting the Commission to perform its competition law functions under this Act, a communication or information that, under the law of the country of the overseas regulator is subject to a privilege analogous to a privilege of a kind referred to in section 54, 56, or 57 of the Evidence Act 2006, that communication or information is subject to the analogous privilege in New Zealand, and the Evidence Act 2006 applies accordingly.

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“(3) The Commission must not provide a communication or information that is subject to the privilege referred to in section 57 of the Evidence Act 2006 (which relates to settlement negotiation and mediation) to an overseas regulator unless every other party that has a privilege in relation to that communication or information consents to the Commission providing the communication or information to the overseas regulator.

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“(4) To avoid doubt, this section applies whether or not a communication or information is provided under a co-operation arrangement.”

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**Commerce (International Co-operation,
and Fees) Amendment Bill**

**Part 2
Fees**

12 Principal Act amended

This **Part** amends the Commerce Act 1986.

13 Regulations

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Section 108 is amended by inserting the following paragraphs after paragraph (cb):

“(cc) requiring the Commission to refund, within a prescribed time, all or any part of a fee paid in respect of an application under section 58, or in respect of a notice under section 66(1) or 67(1), that is more than the cost to the Commission of determining that application or notice:

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“(cd) prescribing a class or classes of persons who are exempt from the requirement to pay any fee prescribed for an application under section 58 or for a notice under section 66(1) or 67(1):”.

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Legislative history

31 July 2012

Divided from Commerce Commission
(International Co-operation, and Fees) Bill
(Bill 293–2) by committee of the whole House as
Bill 293–3A
