

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

Government Bill

Explanatory note

General policy statement

This Bill deals with the operation of the Commerce Commission. It amends the Commerce Act 1986, the Credit Contracts and Consumer Finance Act 2003, and the Fair Trading Act 1986 to authorise the Commerce Commission (the **Commission**) to assist and be assisted by equivalent overseas regulators. It proposes to allow the Commission to use its statutory powers to provide investigative assistance to overseas competition and consumer regulators and to provide compulsorily acquired information to overseas regulators, subject to specified safeguards and the principles of reciprocity. The primary objective of this Bill is to facilitate increased co-operation between the Commission and the Australian Competition and Consumer Commission (the **ACCC**). It will also enable enhanced co-operation with other overseas regulators.

The Bill also makes amendments to the regulation-making powers in the Commerce Act 1986 to require the Commission to provide refunds, where appropriate, and to provide for fee exemptions for particular classes of persons.

Background

Information sharing and the provision of investigative assistance by the Commission is part of the work programme endorsed by CER Ministers in September 2003.¹ The objective is to increase co-ordination of competition and consumer policy and law between Australia and New Zealand. In 2007, the Australian Government passed legislation to enable the ACCC to enhance its ability to provide information to overseas regulators.

The Government released two discussion papers in 2004 and 2005 on the appropriate design of a regime to facilitate enhanced co-operation between the Commission and overseas regulators. Submitters were split in their views about whether further measures were needed to enhance such co-operation. However, given the international nature of business, particularly the increasing internationalisation of hard-core cartels, the proposed assistance provisions will increase the efficiency of investigations and the likelihood that illegal conduct will be effectively dealt with. The benefits are most likely to be obtained in relation to Australia and will, therefore, contribute to the objective of a single economic market.

Reasons why Acts require amendment

The international nature of transactions and territorial limits on regulator jurisdiction mean that it is increasingly desirable for regulators to co-operate to manage competition and consumer effects of transactions on domestic markets.

The Commission is currently constrained from providing investigative assistance and compulsorily acquired information it holds to overseas regulators.

The Commission's statutory powers of compulsion can only be used in relation to enforcement and adjudication within New Zealand. There are also legal constraints on the provision to overseas regulators of confidential compulsorily acquired information already held by the Commission. This in turn limits the willingness of overseas regulators to provide assistance to the Commission, as cross-jurisdictional assistance tends to be based on mutual assistance. Most overseas regulators consider the likelihood of reciprocity as a factor

¹ Joint statement on Closer Economic Relations by the CER 20th Anniversary Ministerial Forum.

in determining whether to provide assistance or information to the Commission.

Objective of Bill

The overarching objective of the Bill is to provide for an efficient regime that facilitates enhanced co-operation between the Commission and overseas regulators, whilst ensuring appropriate safeguards are in place to address public interest considerations.

The Bill aims to achieve this through specifically authorising the Commission to provide investigative assistance and compulsorily acquired information to overseas regulators while setting out requirements and matters relating to when and how this should occur to protect the New Zealand public interest. The Bill also protects privileged documents that the Commission receives from overseas regulators and vice versa.

Main features of regime

Co-operation arrangements

The Bill sets out that the Commission can provide investigative assistance and information compulsorily acquired to overseas regulators, only if there is an applicable governmental co-operation arrangement in place. The co-operation arrangement may cover the provision of other types of information or assistance, and existing common law and administrative law safeguards will apply. The Bill, however, focuses largely on when and how the Commission can provide investigative assistance and compulsorily acquired information.

The Bill requires particular matters to be taken into account before a co-operation arrangement is entered into, minimum requirements for the content of a co-operation arrangement, and publication requirements for an arrangement, once it is in place.

The purpose of a governmental co-operation arrangement is to promote transparency, ensure consideration of certain public interest concerns at the appropriate level, and ensure reciprocity in intent from the overseas jurisdiction.

Requirements relating to specific requests

The Commission must be satisfied of certain matters on a case by case basis before it provides investigative assistance or compulsorily acquired information to an overseas regulator, such as whether the assistance or information relates to a function of the overseas regulator. Other provisions specify considerations the Commission must also have regard to, such as the potential impact on its ability to perform its other functions.

To maintain confidentiality, where appropriate, the Commission will be able to impose conditions. The Bill also maintains the protections in relation to the use of self-incriminating information by requiring an undertaking from the overseas regulator that such information or statements will not be used against the person in criminal proceedings in the overseas jurisdiction.

The objective of setting out case by case basis considerations is to ensure other public interest concerns are taken into account, and to enable appropriate flexibility for the Commission in responding to individual requests.

Notification

The Bill requires the Commission to advise any person to whom the information relates of the provision of information to an overseas regulator, as soon as practical after such information is provided, unless it would be likely to compromise the overseas regulator's or the Commission's investigation, or be impractical.

Maintenance of privilege

Access to material that is privileged in the hands of the Commission or an overseas regulator has the potential to have a significant impact on the efficiency and effectiveness of investigations or proceedings. However, without sufficient certainty about the protection of such documents, it is unlikely that privileged documents will be provided by the Commission to an overseas regulator or vice versa.

The Bill addresses this by providing for the protection of privileged documents that the Commission may provide to an overseas regulator, and vice versa, in order to encourage enhanced co-operation with respect to this type of material.

Fees

The Bill amends the regulation-making powers in the Commerce Act 1986 to require the Commission to refund fees where the application fee is more than the cost of making a determination, and to enable fee exemptions to apply to specified classes of persons.

Conclusion

The Bill proposes to put in place an efficient yet flexible regime that facilitates enhanced co-operation between the Commission and overseas regulators. It seeks to do this whilst ensuring that there are appropriate safeguards in place to address public interest considerations.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Act will commence on the day after the date on which it receives the Royal assent.

Clause 3 is the purpose clause. This Bill deals with 2 quite separate matters. The first relates to the Commerce Commission (the **Commission**) assisting its overseas counterparts (ie, overseas regulators that have competition, consumer credit, and fair trading law functions) by providing information and investigative assistance. This involves amendments to the Commerce Act 1986, the Credit Contracts and Consumer Finance Act 2003, and the Fair Trading Act 1986. The second matter is about the refund of, and exemption from, certain fees payable to the Commission, and involves amending only the regulation-making power in the Commerce Act 1986.

Part 1

Co-operation with overseas regulators

Subpart 1—Amendments to Commerce Act 1986

Clause 4 provides that this subpart amends the Commerce Act 1986 (the **Act**).

Clause 5 amends section 98A. This section allows the Commission to search a place, under warrant, in order to find out whether a person

has been or is contravening the Act. The amendment provides that references in the section to contravening the Act must be taken to include references to contravening certain foreign enactments identified in a co-operation arrangement (*see new section 99E*). This is necessary because, if the Commission is providing investigative assistance to an overseas regulator as permitted by *new section 99H*, the power to search will be exercised for the purpose of finding out whether the person has contravened a particular foreign enactment, rather than the Act.

Clause 6 inserts *new sections 99B to 99O*.

New section 99B sets out the purpose of *new sections 99B to 99O*. This is to provide for when and how the Commission may provide compulsorily acquired information and investigative assistance to overseas regulators, and to clarify various other matters about providing information to overseas regulators.

New section 99C sets out definitions of key terms used in *new sections 99B to 99O*. The defined terms are: compulsorily acquired information; co-operation arrangement; investigative assistance; overseas regulator; and recognised overseas regulator.

New section 99D provides that the Commission must not provide compulsorily acquired information or investigative assistance to any overseas regulator except in accordance with a co-operation arrangement and *new sections 99H to 99J*.

New section 99E provides for the Minister to enter into co-operation arrangements concerning overseas regulators, and sets out the pre-conditions for entering into those arrangements.

New section 99F sets out the minimum content of co-operation arrangements.

New section 99G sets out the procedures associated with co-operation arrangements, including publication.

New section 99H sets out when the Commission may provide compulsorily acquired information and investigative assistance to recognised overseas regulators (ie, those that are the subject of a co-operation arrangement). It sets out certain matters that the Commission must be satisfied of before it provides the information or assistance, and other matters that it must have regard to.

New section 99I provides for the Commission to impose conditions on the provision of compulsorily acquired information or investiga-

tive assistance. A particular condition relates to maintaining, as far as possible, the provisions of section 106(4) and (5) of the Act if information is provided to an overseas regulator. Under section 106(4), a person is not excused from complying with certain requirements on the grounds that to do so might tend to incriminate the person. However, under section 106(5), statements made by a person in answer to a question put by or before the Commission may not be used in criminal proceedings or certain civil proceedings. The protection of such statements is to be carried forward by requiring that the statements cannot be provided to overseas regulators unless the regulator gives a written undertaking that they will not be used by the regulator against the maker of the statement in criminal proceedings or proceedings for civil pecuniary penalties, nor (to the extent that the regulator can ensure this) be used by any other person in such proceedings.

New section 99J provides for notice to be given to certain people when compulsorily acquired information is provided to recognised overseas regulators.

New section 99K requires the Commission to include information about the use and operation of co-operation arrangements in its annual report.

New section 99L confirms that the Commission's ability to provide non-compulsorily acquired information to an overseas regulator is not affected by *new sections 99B to 99K*, nor by whether the overseas regulator is the subject of a co-operation arrangement. This provision is necessary to clarify that this Bill is not intended to restrict or affect the ways in which the Commission co-operates with overseas regulators, except in relation to compulsorily acquired information and investigative assistance.

New section 99M clarifies that nothing in *new sections 99B to 99K* or a co-operation arrangement prevents the Commission providing information to an overseas regulator if the person who is the subject of the information consents.

New section 99N confirms that the Commission must not provide any information that it has obtained under, pursuant to, or for the purposes of Part 4 or Part 4A of the Act. This is because such information is obtained by the Commission in relation to its functions relating to the regulation of controlled goods and services, rather than to functions relating to competition law per se.

New section 99O deals with matters relating to waiver of privilege. If the Commission has a privilege in respect of certain communications or information, this section provides that the privilege is not waived merely because the privileged communication or information is provided to an overseas regulator. *Subsection (2)* then states that if a privileged communication or information is received from an overseas regulator it will be treated as subject to an analogous privilege in New Zealand. This will reassure overseas regulators that provide privileged information to the Commission that the privilege will be maintained as far as possible. In practice, the Commission is unlikely to provide privileged material to an overseas regulator unless there is an equivalent statutory provision in the jurisdiction of the overseas regulator. *Subsection (3)* then provides that the Commission must not provide communications that are subject to what is commonly called “negotiation privilege” unless all other parties who also hold a privilege in respect of that information consent.

Subpart 2—Amendments to Credit Contracts and Consumer Finance Act 2003

Clause 7 provides that this subpart amends the Credit Contracts and Consumer Finance Act 2003 (the CCCFA).

Clause 8 amends section 113 of the CCCFA. This section applies various provisions of the Commerce Act 1986 to the CCCFA. The amendment inserts a reference to *new sections 99B to 99O*, and provides for references in those sections to competition law and to the Minister to be treated as if they were modified in a manner appropriate for their application to the CCCFA.

Subpart 3—Amendments to Fair Trading Act 1986

Clause 9 provides that this subpart amends the Fair Trading Act 1986. *Clauses 10 and 11* replicate, in the Fair Trading Act 1986, the amendments made to the Commerce Act 1986 by *clauses 5 and 6*. This means that these clauses amend the section relating to powers of search, and insert a number of new sections providing for assistance

to overseas regulators. The only relevant differences between the 2 sets of provisions are—

- references in the Commerce Act 1986 to “competition law” are changed to references to “fair trading law” in the Fair Trading Act 1986:
- *new section 48I(2)* in the Fair Trading Act 1986 differs from *new section 99I(2)* in the Commerce Act 1986 (which is about overseas regulators giving a written undertaking not to use certain information in criminal or civil pecuniary penalty proceedings). The reason for the difference is that the Fair Trading Act 1986 does not contain an equivalent of section 106(4) and (5) of the Commerce Act 1986. The Fair Trading Act 1986 provision can therefore provide a broader form of protection to people who provide self-incriminating information under compulsion:
- there is no equivalent to *new section 99N*, which is about information under Parts 4 and 4A of the Commerce Act 1986, because it is not relevant to the Fair Trading Act 1986.

Regulatory impact statement

Executive summary

Information sharing

Business is increasingly international in nature and it is becoming more desirable that regulators co-operate with their overseas counterparts to manage the effective enforcement of competition and consumer protection laws. Currently, the Commerce Commission (the **Commission**) is constrained in its ability to share information and provide assistance to equivalent overseas regulators. This in turn constrains overseas regulators from providing assistance to the Commission as this tends to be based on reciprocity. In particular, this impedes co-operation in the enforcement of trans-Tasman competition and consumer laws. To address this, it is proposed that amendments be made to the Commerce Act 1986, Fair Trading Act 1986, and Credit Contracts and Consumer Finance Act 2003 (the **Acts**) to enable the Commission to provide investigative assistance and compulsorily acquired information, subject to specific safeguards to protect New Zealand public interests. To facilitate increased co-operation between the Commission and overseas regulators with respect

to privileged material, it is also proposed to have specific protections for privileged material the Commission may provide or receive from an overseas regulator.

SME fee exemption

Small and medium enterprises (SMEs) may be deterred from undertaking competitively benign or efficient business practices due to uncertainty about Commerce Act 1986 risks, and the costs of the clearance and authorisation processes. It is proposed that a fee exemption be introduced for SMEs who meet specific criteria.

Adequacy statement

The Ministry of Economic Development has reviewed the RIS and considers the RIS is adequate according to the adequacy criteria.

Status quo and problem

Information sharing

The international nature of transactions and territorial limits on regulator jurisdiction mean that it is increasingly desirable for regulators to co-operate to manage the effects of those transactions on domestic markets.

Legislative constraints prevent the Commission from providing investigative assistance to overseas competition and fair trading regulators. Currently, the Acts prevent the Commission from using its information gathering powers to assist equivalent overseas regulators by virtue of the requirement that the powers may only be used to carry out the Commission's statutory functions under these Acts.

Administrative law and common law constraints also limit the Commission's ability to share compulsorily acquired information it already holds where the sharing is incidental to the purpose for which the information was obtained. Information may only be further disclosed if there is a prevailing public interest in that further disclosure. The scope of the public interest exception is uncertain in relation to sharing confidential information with an overseas regulator to enforce a potential contravention of another country's laws, as it may be difficult to assess the direct benefit to New Zealand.

These constraints especially impede trans-Tasman enforcement of competition and fair trading laws. The Commission and the ACCC advise that the constraints on co-operation are impeding trans-Tasman investigations, but these constraints also inhibit the ability of the Commission to provide and receive co-operation from its overseas counterparts generally. Many overseas laws consider the likelihood of reciprocity as being a relevant consideration in determining whether to accept any request.

A separate issue relates to privileged material. The Commission is unlikely to provide such information to an overseas regulator due to the risk that parties to litigation in New Zealand and in the overseas jurisdiction may be able to persuade a court that privilege was waived at the point that it was disclosed to the overseas regulator. Similarly, the Commission may be constrained from accessing important information from overseas regulators as they will be very reluctant to disclose privileged material without a statutory guarantee that the information would receive the same level of protection that would exist in the overseas jurisdiction.

SME fee exemption

SMEs are likely to be deterred from using the clearance and authorisation processes under the Commerce Act 1986 due to the costs involved. This may prevent SMEs from undertaking competitively benign or efficient behaviour, or proceeding with anti-competitive behaviour. If efficient behaviour is being deterred, this is a loss of activity that would improve consumer welfare. On the other hand, SMEs who proceed with behaviour that is anti-competitive reduce consumer welfare. It is also more costly to take enforcement action than to use the clearance or authorisation processes.

Objectives

The overall objectives are to—

- reduce the incidence of illegal conduct by providing for more efficient and effective mutual assistance arrangements between the Commission and equivalent overseas regulators. This includes providing a regime that will facilitate enhanced co-operation with the ACCC, and contribute towards progress towards a single economic market with Australia; and

- provide appropriate safeguards to protect the public interest in relation to the provision of particular types of assistance.

Alternative options

Information sharing

Option 1: status quo

The Commission carries out a number of functions under the Acts including enforcement, adjudications on clearances and authorisations, and regulatory control functions. The Commission has prescribed powers under the Acts to obtain information to enable it to carry out its statutory functions. In addition the Commission has a number of specific information gathering powers, each designed for a particular statutory function.

The Commission may only use its powers to carry out its statutory functions. A limited exception is that, under the Commerce Act 1986, the Commission may take evidence on behalf of the ACCC in respect of alleged contraventions of the trans-Tasman abuses of market power prohibition under the Australian Trade Practices Act.

The Commission has 4 co-operation arrangements with overseas competition regulators, including the ACCC. These arrangements generally only relate to the exchange of public and agency-confidential information (and not company and individual confidential information). They provide for one country to share information with the other country, subject to domestic law constraints, where the regulators agree it is in their mutual interests. They do not extend to providing investigative assistance.

Information obtained other than through the use of the Commission's investigative powers may be exchanged (outside of formal arrangement) or, if confidential or personal, by consent of the parties involved.

The generic Mutual Assistance in Criminal Matters Act 1992 (the **MACMA**) would allow an overseas regulator to apply through its government to the New Zealand Attorney-General for investigative assistance as part of a criminal proceeding under its laws. However, this mechanism would not apply to many prohibitions under overseas competition laws, which are generally civil jurisdictions. The

MACMA does not seem to have been used in the competition context.

The status quo does not meet the policy objectives.

Option 2: generic legislation

Generic legislation could provide for investigative assistance to an overseas regulator in relation to all business regulation. This legislation would apply to the enforcement of a wide range of business regulation and could be based on the MACMA. It could, for example, empower any foreign country to request the New Zealand Attorney General to approve a public authority to obtain the information requested.

This is not the preferred option as it would not be tailored to address issues specific to competition and fair trading law issues, but a wider range of issues relating to business regulation. It would not enable the Commission to address the problem in a timely manner, as it would require seeking approval from the Attorney-General. It may also not be flexible enough to mirror corresponding overseas co-operation arrangements (for example, with the US or Canada) that would be necessary to enable the Commission to seek reciprocal investigative assistance.

SME fee exemption

Option 1: threshold relating to the value of a transaction

While this option would be relatively easy to apply to clearance applications, it would be difficult to apply to applications for authorisation of a restrictive trade practice. This is because it is often not straightforward to assess a transaction value for a trade practice. For example, an application for authorisation could relate to certain rules around marketing, procurement, or collective bargaining arrangements where a transaction value is not readily available. This is not the preferred option.

Preferred option

Information sharing

The preferred option is to amend the Acts to authorise the Commission to use its statutory powers to provide investigative assistance and share compulsorily acquired information (**assistance**) with an overseas regulator. The key features of the proposal are set out below.

Co-operation arrangements

- before assistance can be provided, a formal co-operation arrangement must be agreed between governments. This will authorise the respective regulators to provide assistance and is intended to be a high-level arrangement, executed by the Minister responsible for the relevant Act(s). The arrangement will include public interest considerations including identifying the foreign enactments for which compulsorily acquired information and assistance may be provided, consistency with international obligations, and reciprocal obligations:
- the relevant Minister must also have regard to the legal protections relating to the use of information that are available in the overseas jurisdiction, and the potential consequences for New Zealand consumers and business of providing assistance and/or information to the overseas regulator:
- while such an arrangement will be mandatory for sharing compulsorily acquired information and providing investigative assistance, the Commission can share non-compulsorily acquired information subject to existing safeguards and informal arrangements as it currently does. This information may be included in the government-to-government arrangement, but such an arrangement will not be a mandatory requirement for the provision of this type of information.

Specific requirements for dealing with individual requests for assistance

- before responding to a request for assistance, the Commission must have regard to specific public interest considerations, such as the potential impact of compliance with a request on the performance of its other functions, and whether the matter

can be more appropriately or conveniently dealt with through other means:

- when providing information to an overseas regulator, the Commission will be able to impose conditions to maintain confidentiality:
- to maintain protections relating to the use of self-incriminating information under the relevant Acts, the Commission will be required to obtain an undertaking from the overseas regulator to ensure that self-incriminating information obtained under compulsion will not be used in criminal proceedings in the foreign jurisdiction against the person who provided the information:
- the Commission must advise any affected person of the provision of information to an overseas regulator, unless such advice would be likely to compromise the overseas regulator's or the Commission's investigation:
- the Commission will be required to report annually on how the information sharing regime is working.

Maintenance of privilege

To protect privileged material, it is proposed that any information that the Commission receives from an overseas regulator that is privileged in the overseas jurisdiction will be deemed as if privileged under the Evidence Act 2006. Similarly, if the Commission discloses privileged material to an overseas regulator, it is proposed to specify that it does not waive privilege by doing so.

Impacts on government

By facilitating co-operation by the Commission with its overseas counterparts, the Commission's international reputation as an efficient and effective regulator should be enhanced. The Commission's performance of its functions under the Acts should also be enhanced via reciprocal assistance from overseas regulators.

Some businesses or individuals may have increased incentives to reduce voluntary co-operation with the Commission to avoid detection of contraventions of overseas laws. This could marginally reduce the effectiveness of the Commission's enforcement.

The net fiscal impact of enhanced co-operation will be neutral. Investigative assistance provided by the Commission to overseas regulators will not be permitted if the use of the Commission's resources would detrimentally affect the performance of its functions under the Acts. In addition, the Commission will be able to recover costs from the overseas regulator as desirable.

Impacts on industry and consumers

The parties directly affected will be those New Zealand based parties who carry on business in overseas markets and who risk contravening domestic and overseas competition and consumer laws. These parties will face increased deterrents to contravening these overseas laws. Some parties may react to this by increasing the use of legal advisers in their dealings with the Commission, with associated costs.

The parties who will indirectly benefit from enhanced co-operation by regulators are consumers and businesses in New Zealand who are harmed by anti-competitive behaviour or unfair trading in New Zealand markets by overseas-based parties. Enhanced co-operation will increase the likelihood of detecting and successfully penalising overseas based parties that contravene the Acts. This should promote competition and fair trading in domestic markets, resulting in lower prices, a greater choice of products, and enhanced consumer protection.

The combined effect is that enhanced co-operation should produce net benefits to New Zealand. Benefits include increased competition, lower prices, better quality, greater choice, and a trading environment where consumers can expect a fair outcome and can transact with confidence.

SME fee exemption

The preferred option is for the Commission to be able to apply an SME exemption to an entity that applied for clearance or authorisation that met 2 of the following criteria:

- (a) the value of assets (including intangible assets) of the company for the most recent financial year did not exceed \$1,000,000;
- (b) the turnover of the entity, for the most recent financial year, did not exceed \$2,000,000;
- (c) the entity has 5 or fewer full-time employees.

In the case where a larger business wants to acquire an SME, the acquirer would still be expected to pay the application fee. For applications for authorisation of a restrictive trade practice, the SME exemption would apply if the largest party to the transaction met 2 out of the 3 criteria above.

This option provides flexibility in identifying eligible SMEs and would make the clearance and authorisation processes less costly for them. There are some minor risks that a larger entity may be deterred from acquiring a smaller one but there are likely to be few transactions a year that will potentially be affected in this way. There is also a small risk of an increase in applications from SMEs for authorisation of trade practices such as collective bargaining arrangements.

Implementation and review

Amendments to the Commerce Act 1986, the Credit Contracts and Consumer Finance Act 2003, and the Fair Trading Act 1986 are required. It is proposed that these amendments be implemented through the Commerce Commission (International Co-operation, and Fees) Bill, to be passed in 2009.

Consultation

Stakeholder consultation

The Ministry of Economic Development released a public discussion document in September 2004 on information sharing and received 8 submissions. In parallel, the Australian Productivity Commission considered information sharing between the ACCC and Commission as part of its 2004 report on Australian and New Zealand competition and consumer protection regimes. The Productivity Commission released an issues paper and draft report, held round-tables in New Zealand, and received 32 submissions of which 18 were from New Zealanders. The OECD Competition Committee has held roundtables with member countries on information sharing between competition enforcement agencies, at which international business and law associations were represented.

The Ministry of Consumer Affairs, in May 2004, also forwarded to consumer and business organisations, legal firms, and other enforcement agencies an outline of the proposed amendment to the Fair Trad-

ing Act 1986 to allow for the Commission to share information with overseas and domestic regulators. 10 submissions were received.

Government departments/agencies consultation

The Commerce Commission, the Ministry of Justice, the Ministry of Foreign Affairs and Trade, the Treasury, and the Office of the Privacy Commissioner have been consulted. The Legislative Design Committee has been consulted. The Department of Prime Minister and Cabinet has been informed.

Hon Lianne Dalziel

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

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Commerce Commission (International Co-operation, and Fees) Act **2008**.

2 Commencement

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

3 Purpose

(1) The purpose of this Act is—

(a) to provide for when and how the Commerce Commission may provide compulsorily acquired information and investigative assistance to overseas regulators that have competition, consumer credit, or fair trading law functions, and to clarify other matters relating to the provision of information; and

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(b) to allow the Commerce Commission to refund or provide exemptions in relation to certain fees payable in connection with applications under the Commerce Act 1986.

(2) In order to achieve the purpose set out in **subsection (1)(a)**, **Part 1** amends—

(a) the Commerce Act 1986; and
(b) the Credit Contracts and Consumer Finance Act 2003; and
(c) the Fair Trading Act 1986.

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(3) In order to achieve the purpose set out in **subsection (1)(b)**, **Part 2** amends section 108 of the Commerce Act 1986 to allow regulations to be made to provide for refunds and exemptions.

Part 1**Co-operation with overseas regulators**Subpart 1—Amendments to Commerce Act
1986

- 4 Principal Act amended** 5
This **subpart** amends the Commerce Act 1986.
- 5 Power to search**
Section 98A is amended by adding the following subsection:
“(4) 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.” 10 15
- 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)** 20
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 25
of information with overseas regulators.
- “**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 concern- 30
ing the Commerce Commission and an overseas regulator that is entered into under **section 99E** between the Government of New Zealand and—
“(a) the government of the country in which the overseas regulator is established; or 35

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

“**compulsorily acquired information** means information that— 5

“(a) is acquired by the Commission as a result of, or in relation to, the exercise by the Commission of any of its powers under sections 98, 98A, or 98H, or any power incidental to those powers; and

“(b) is not in the public domain 10

“**investigative assistance** includes providing assistance by way of exercising any power of the Commission under, or in relation to, sections 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 15

“**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** 20

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 25

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

“**99E Entering into 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 for— 30

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

“(b) the provision by the overseas regulator of information and investigative assistance to the Commission. 35

- “(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 5
 - “(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
 - “(c) consult with the Privacy Commissioner on any privacy issues arising from the proposed co-operation arrangement. 10
- “(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. 15
- “(4) Every co-operation arrangement must provide for the Commission and the overseas regulator to provide information and assistance to each other.
- “99F Content of co-operation arrangements 20**
- “(1) Every co-operation arrangement must—
- “(a) identify the overseas regulator that it concerns; and
 - “(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 25
 - “(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.
- “(2) A co-operation arrangement may also— 30
- “(a) provide for the reimbursement of the Commission for costs incurred in providing the information or assistance; and
 - “(b) include other conditions on the provision of compulsorily acquired information or investigative assistance. 35

“99G Procedures relating to co-operation arrangements

- “(1) Every co-operation arrangement must be in writing and be signed by 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 considers appropriate. 5
- “(2) As soon as practicable after entering into a co-operation arrangement, the Minister must—
- “(a) give a copy of the arrangement to the Commission; and
 - “(b) publish a notice in the *Gazette* that— 10
 - “(i) states that the arrangement has been entered into; and
 - “(ii) identifies the overseas regulator concerned; and
 - “(iii) identifies the parties to the arrangement; and
 - “(iv) states when the arrangement comes into effect. 15
- “(3) Within 15 working days of receiving the notice from the Minister, the Commission must publish a copy of the co-operation arrangement on its public Internet site, and must keep it there while the arrangement continues in force.
- “(4) **Subsections (1) to (3)** apply with all necessary modifications 20 to every amendment to a co-operation arrangement.

“99H Providing compulsorily acquired information and investigative assistance

- “(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: 25
- “(a) provide compulsorily acquired information to the recognised overseas regulator;
 - “(b) provide investigative assistance to the recognised overseas regulator. 30
- “(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 35

- “(b) the provision of the information or assistance will not be inconsistent with the co-operation arrangement.
- “(3) In considering whether to provide compulsorily acquired information or investigative assistance in accordance with a co-operation arrangement, the Commission must also consider— 5
- “(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
- “(b) whether the recognised overseas regulator could more conveniently obtain the information or assistance from another source; and 10
- “(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. 15
- “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— 20
- “(a) maintaining the confidentiality of information; and
- “(b) the storage, use of, or access to anything provided; and
- “(c) the copying, returning, or disposal of copies of anything provided; and 25
- “(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 unless the recognised overseas regulator gives a written undertaking— 30
- “(a) that it will not use such statements as evidence—
- “(i) in criminal proceedings against the person (other than in proceedings in respect of the falsity of the person’s testimony); or 35
- “(ii) in proceedings against the person for a pecuniary penalty or any equivalent proceedings; and

“(b) that, to the extent that it is within the ability of the overseas regulator to ensure, such statements will not be used by any other person, authority, or agency as evidence in proceedings referred to in **paragraph (a)**.

“**99J Notice to persons affected by provision of information** 5

“(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: 10

“(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 15

“(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 20

“(c) it is not practicable in the circumstances to give notice to the person.

“**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— 25

“(a) the number and general nature of requests for information and investigative assistance received from recognised overseas regulators; and 30

“(b) the number and general nature of requests for information and investigative assistance that the Commission has made to recognised overseas regulators.

- “99L Sharing of non-compulsorily acquired information not affected** 5
- 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—
- “(a) **sections 99B to 99K**; or
- “(b) whether or not the overseas regulator is a recognised overseas regulator.
- “99M Information provided by consent** 10
- 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.
- “99N Parts 4 and 4A information not to be provided** 15
- 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 or 4A, unless the information is already in the public domain.
- “99O Maintenance of privilege** 20
- “(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. 25
- “(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 30 35

privilege in New Zealand, and the Evidence Act 2006 applies accordingly.

“(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. 5

“(4) To avoid doubt, this section applies whether or not a communication or information is provided under a co-operation arrangement.” 10

Subpart 2—Amendment to Credit Contracts and Consumer Finance Act 2003

7 **Principal Act amended** 15
This **subpart** amends the Credit Contracts and Consumer Finance Act 2003.

8 **Application of Commerce Act 1986**
Section 113 is amended by inserting the following paragraph after paragraph (e): 20
“(eb) **sections 99B to 99O** (assistance to overseas regulators), as if—
“(i) references in those sections to competition law were references to consumer credit law; and
“(ii) references in those sections to the Minister were 25
references to the Minister of Consumer Affairs:”.

Subpart 3—Amendments to Fair Trading Act 1986

9 **Principal Act amended**
This **subpart** amends the Fair Trading Act 1986. 30

10 **Power to search**
Section 47 is amended by adding the following subsection:

- “(4) For the purpose of allowing the Commission to provide, under **section 48H**, 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 48F(1)(b)**) in the co-operation arrangement concerning that recognised overseas regulator.” 5
- 11 New sections 48B to 48N inserted** 10
The following sections are inserted after section 48A:
- “**48B Purpose of sections 48C to 48N (which relate to assistance to overseas regulators)**
The purpose of **sections 48C to 48N** is—
- “(a) to provide for when and how the Commission may provide compulsorily acquired information and investigative assistance to overseas regulators; and 15
- “(b) to clarify other matters relating to sharing other kinds of information with overseas regulators.
- “**48C Definitions of terms used in sections 48B to 48N** 20
In **sections 48B to 48N**, unless the context otherwise requires,—
- “**co-operation arrangement** means an arrangement concerning the Commerce Commission and an overseas regulator that is entered into under **section 48E** between the Government of New Zealand and— 25
- “(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 government of that international body 30
- “**compulsorily acquired information** means information that—
- “(a) is acquired by the Commission as a result of, or in relation to, the exercise by the Commission of any of its powers under sections 47 or 47G, 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, sections 47 or 47G, and any powers incidental to those powers

“**overseas regulator** means an overseas body that has fair trading 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.

“**48D 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 48H to 48J**.

“**48E Entering into 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 for— 20

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

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

“(c) consult with the Privacy Commissioner on any privacy issues arising from the proposed co-operation arrangement. 35

- “(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.
- “(4) Every co-operation arrangement must provide for the Commission and the overseas regulator to provide information and assistance to each other. 5
- “48F Content of co-operation arrangements**
- “(1) Every co-operation arrangement must— 10
- “(a) identify the overseas regulator that it concerns; and
- “(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. 15
- “(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 20
- “(b) include other conditions on the provision of compulsorily acquired information or investigative assistance.
- “48G Procedures relating to co-operation arrangements**
- “(1) Every co-operation arrangement must be in writing and be signed by 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 considers appropriate. 25
- “(2) As soon as practicable after entering into a co-operation arrangement, the Minister must— 30
- “(a) give a copy of the arrangement to the Commission; and
- “(b) publish a notice in the *Gazette* that—
- “(i) states that the arrangement has been entered into; and 35
- “(ii) identifies the overseas regulator concerned; and
- “(iii) identifies the parties to the arrangement; and

- “(iv) states when the arrangement comes into effect.
- “(3) Within 15 working days of receiving the notice from the Minister, the Commission must publish a copy of the co-operation arrangement on its public Internet site, and must keep it there while the arrangement continues in force. 5
- “(4) **Subsections (1) to (3)** apply with all necessary modifications to every amendment to a co-operation arrangement.
- “**48H Providing compulsorily acquired information and investigative assistance**
- “(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: 10
- “(a) provide compulsorily acquired information to the recognised overseas regulator:
- “(b) provide investigative assistance to the recognised overseas regulator. 15
- “(2) Before providing information or assistance under **subsection (1)**, the Commission must be satisfied that—
- “(a) providing the compulsorily acquired information or investigative assistance will, or is likely to, assist the recognised overseas regulator in performing its functions or exercising its powers in relation to fair trading law; and 20
- “(b) the provision of the compulsorily acquired information or investigative assistance will not be inconsistent with the co-operation arrangement. 25
- “(3) In considering whether to provide information or investigative assistance under a co-operation arrangement, the Commission must also consider—
- “(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 35
- “(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.

“48I 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, 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 compulsorily acquired information that was given by a person whom the information might tend to incriminate unless the recognised overseas regulator gives a written undertaking— 15
- “(a) that it will not use the information as evidence—
 - “(i) in criminal proceedings against the person (other than in proceedings in respect of the falsity of the person’s testimony); or 20
 - “(ii) in proceedings against the person for a pecuniary penalty or any equivalent proceedings; and
 - “(b) that, to the extent that it is within the ability of the overseas regulator to ensure, the information will not be used by any other person, authority, or agency as evidence in proceedings referred to in **paragraph (a)**. 25

“48J 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: 30
- “(a) the person from whom the information was acquired:
 - “(b) every person to whom the information relates. 35
- “(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
- “(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 5
- “(c) it is not practicable in the circumstances to give notice to the person.
- “**48K Reporting on use of co-operation arrangements** 10
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—
- “(a) the number and general nature of requests for information and investigative assistance received from recognised overseas regulators; and 15
- “(b) the number and general nature of requests for information and investigative assistance that the Commission has made to recognised overseas regulators.
- “**48L Sharing of non-compulsorily acquired information not affected** 20
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 48B to 48K**; or
- “(b) whether or not the overseas regulator is a recognised overseas regulator.
- “**48M Information provided by consent** 30
Nothing in **sections 48B to 48K** 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.

- “48N Maintenance of privilege**
- “(1) If the Commission provides to an overseas regulator, for the purpose of assisting the overseas regulator to perform its fair trading 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. 5
- “(2) If the Commission receives from an overseas regulator, for the purpose of assisting the Commission to perform its fair trading 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. 10 15
- “(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. 20 25
- “(4) To avoid doubt, this section applies whether or not a communication or information is provided under a co-operation arrangement.”

Part 2

Fees

- 12 Principal Act amended** 30
This **Part** amends the Commerce Act 1986.
- 13 Regulations**
Section 108 is amended by inserting the following paragraphs after paragraph (cb): 35

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- “(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 70B(1), 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: 5
- “(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 70B(1) or for a notice under section 66(1) or 67(1).” 10
-