

Legislative statement: Commerce Amendment Bill

Second Reading

Overview

The Commerce Amendment Bill (**the Bill**) amends the Commerce Act 1986 (**the Act**) to improve the reach and functioning of competition law consistent with the Act's purpose of promoting competition in markets for the long-term benefit of consumers within New Zealand. The Bill does this by:

- strengthening the Act's section 36 prohibition against misuse of market power
- increasing the range of situations in which the Commerce Commission can authorise conduct likely to contravene Part 2 of the Act but which is in the public interest
- repealing safe harbours in the Act for intellectual property
- making a number of other changes to improve the functioning of the Act.

Changes relating to the section 36 prohibition against misuse of market power

Section 36 aims to prevent firms with substantial market power from maintaining or extending their market power through conduct that impairs the ability of rivals to compete on their merits. This conduct by dominant firms can lead to higher prices, lower quality goods and services, and weak incentives for investment and innovation.

The Bill replaces section 36 to better target this prohibition directly at the anti-competitive impact of a firm's conduct in the market. Firms with substantial market power would be prohibited from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition – a test that is used elsewhere in the Commerce Act and in the equivalent prohibition in the Australian Competition and Consumer Act 2010.

This change is expected to reduce the cost and complexity of enforcement and improve the deterrent value of the prohibition.

The Bill would allow parties to seek authorisation from the Commerce Commission for conduct that may technically contravene section 36, but which is in the public interest. This change recognises that, in exceptional cases, some contravening conduct may be desirable because the firm can identify wider public benefits that outweigh any detriments to competition.

Repeal of safe harbours for some activities relating to intellectual property

The Act contains three provisions that appear to protect certain intellectual property arrangements from scrutiny under competition law, even if those arrangements harm competition. The Bill would repeal these partial exceptions, or 'safe harbours'. They reflect an outdated understanding that intellectual property rights are, by their very nature, incompatible with the aims of competition law.

Intellectual property policy and competition policy both seek to enhance economic and consumer welfare by promoting innovation. The exclusivity or limited monopoly granted by an intellectual property right is generally unlikely to raise concerns of a kind competition law is intended to address. The right is typically much narrower than the market for the product or service that is relevant to competition law. The availability of close substitutes and competitive pressure ensures that intellectual property rights holders typically do not have enduring market power.

However, there are cases where intellectual property-related conduct could lead to a lessening of competition. The Bill would ensure that anti-competitive conduct involving intellectual property is able to be examined on the same basis as conduct involving other forms of property.

Technical changes to improve the functioning of competition law

The Bill makes several other amendments to the Act to improve its operation, including:

- It extends the prohibition against cartels to covenants that create or implement a cartel (restoring the pre-2017 position that the prohibition is not limited to agreements).
- It clarifies that the Act's prohibitions against collusion or exclusionary conduct apply to rights or interests in land, in the same way they apply to other kinds of property exchanged in trade. This is a clarification only and does not extend the scope of the Act.
- It aligns the maximum pecuniary penalties that can be imposed for anti-competitive mergers and acquisitions with those that can be imposed for other forms of anti-competitive conduct.
- It provides flexibility to appoint between four and eight full Commissioners (rather than between four and six) to reflect an extension of the Commerce Commission's functions over time.
- It establishes mechanisms for the Commerce Commission to share information it holds in relation to its statutory functions with other government agencies or regulators, subject to safeguards relating to the use and storage of that information. The Privacy Act 2020 would continue to apply.

Amendments made by select committee

The Economic Development, Science and Innovation Committee has examined the Bill and recommended that it be passed with amendments. These amendments are consistent with the original policy of the Bill, but address some technical issues with the Bill and take the opportunity to make some further improvements to the functioning of the Act. The more notable of these recommended changes to the Bill are as follows:

- Reforms to the prohibition against misuse of market power in trans-Tasman markets (section 36A) consistent with those made to section 36, including the availability of authorisation.
- An amendment to the cartel offence in section 82B (which came into force on 8 April 2021) so that it also applies in relation to cartel provisions in covenants – however, the Bill would not extend this criminal liability to acts done in accordance with cartel provisions in covenants that were entered into before this amendment comes into force.
- Amendments to the authorisation provisions with a similar effect to those temporarily inserted by the COVID-19 Response (Further Management Measures) Legislation Act 2020 – they empower the Commerce Commission to grant authorisation on an interim basis, pending its determination of the substantive application, and to directly grant authorisation for cartel conduct when in the public interest.
- Some adjustments to the transitional arrangements in the Bill, including a reduction in the transitional period for intellectual property arrangements affected by the repeal of section 45 and for cartel provisions in existing covenants (from three years to 12 months after a 12-month delayed commencement period).