

## COMMERCE AMENDMENT BILL

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### EXPLANATORY NOTE

#### GENERAL POLICY STATEMENT

The main goal of penalties and remedies under the Commerce Act 1986 is to promote general deterrence. It is considered that the Act is not fully consistent with this goal at present.

This Bill will assist general deterrence by clarifying when certain offences are illegal, increasing the likelihood that offences will be detected, making offending profitless both for bodies corporate and their agents, and halting anti-competitive conduct at an early stage by signalling more use of interim injunctions.

#### CLAUSE BY CLAUSE ANALYSIS

*Clause 1* relates to the Short Title and commencement.

*Clause 2* inserts a new definition of “turnover” in section 2 of the principal Act (which relates to interpretation).

The new definition arises out of *new section 80 (2) (b) (ii)* (inserted by *clause 6 (2)*) which increases and provides alternative pecuniary penalties in the case of bodies corporate that engage in certain restrictive trade practices.

*Clause 3* substitutes a *new section 30* in the principal Act.

At present, section 30 deems price fixing to substantially lessen competition for the purposes of section 27 (which prohibits contracts, arrangements, or understandings that have the purpose, or have or are likely to have the effect, of substantially lessening competition in a market).

*New section 30 (1)* clarifies that, in addition to price fixing, bid rigging, market allocation, and output limitation agreements are also deemed to substantially lessen competition for the purposes of section 27.

*Clause 4* repeals section 35 of the principal Act, which will be relocated in *new section 59* (inserted by *clause 5*). The purpose of the relocation is to keep the provisions relating to authorisations together in Part V of the principal Act.

*Clause 5* replaces section 59 of the principal Act with *new sections 59 to 59B*.

*New section 59* carries over the existing section 35 relating to contracts or covenants subject to authorisation not being prohibited in certain conditions.

*New section 59A* effectively replaces the existing section 59, which sets out the circumstances in which the Commission must not grant an authorisation.

*New section 59A* enables the Commission to grant an authorisation for certain restrictive trade practices even though the applicant has done the act or is already engaging in the practice.

However, all of the parties to the contract, arrangement, or understanding must discontinue engaging in those practices until authorisation is granted.

*New section 59B* clarifies that the granting of an authorisation under *new section 59* or *new section 59A* does not prevent conduct that occurred before an authorisation was granted in respect of it and that would otherwise have constituted a contravention of the Act from continuing to constitute a contravention.

*Clause 6* makes a number of amendments to section 80 of the principal Act (which relates to pecuniary penalties for certain restrictive trade practices).

*Subclause (2)* replaces section 80 (2) with *new subsections (2) to (2B)*.

*New subsection (2)* increases the maximum amount of a pecuniary penalty for a body corporate to the greater of—

- \$5,000,000; or
- Three times the value of any commercial gain or expected commercial gain or, if the commercial gain or expected commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and its interconnected bodies corporate (if any).

The maximum amount of a pecuniary penalty for an individual is still \$500,000.

*New subsection (2A)* provides that the Court must order an individual who has engaged in certain conduct to pay a pecuniary penalty, unless the Court considers that there is good reason for not making such an order.

*New subsection (2B)*, which replaces the existing subsection (2), provides that the Court must have regard to all relevant matters and, in particular, the nature and extent of any commercial gain, or any expected commercial gain, at the time of the contravention.

The amendment in *subclause (3)* effectively extends the limitation period in section 80 (5) for bringing proceedings under section 80.

At present, the 3-year limitation period runs from when the matter giving rise to the contravention arose.

The new 3-year limitation period runs from the date the contravention was discovered or ought reasonably to have been discovered. However, proceedings may not be commenced 10 years or more after the date of the contravention.

*Clause 7* inserts *new sections 80A to 80E* in the principal Act.

*New section 80A* prohibits a body corporate from indemnifying a director, servant, or agent of that body corporate or an interconnected body corporate in respect of liability or costs relating to pecuniary penalties imposed under section 80 for certain restrictive trade practices.

However, the body corporate may, if expressly authorised by its constitution, provide an indemnity for costs incurred by its directors, servants, or agents in proceedings under section 80—

- That relate to liability for any act or omission in his or her capacity as a director, servant, or agent; and
- In which judgment is given in his or her favour or which is discontinued.

*New section 80B* enables the Court to make an order directing a body corporate that acts in contravention of *new section 80A* to pay a pecuniary penalty, not exceeding 2 times the value of any indemnity given in contravention of that section.

*New sections 80c to 80E*, which are related, are based on section 283 of the Companies Act 1993 (Court may disqualify directors).

*New section 80c* enables the Court to make an order excluding persons who have engaged in certain restrictive trade practices from being a director, promoter, or otherwise being involved in the management of a body corporate for a period not exceeding 5 years.

*New section 80d* sets out the procedural matters relating to an application for an order under *new section 80c*.

*New section 80E* makes it an offence for a person to act in contravention of an order made under *new section 80c*.

A person who is convicted of such an offence is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$200,000.

*Clause 8* replaces section 82 (2) of the principal Act (which relates to the limitation period for bringing an action for damages arising out of contraventions concerning certain restrictive trade practices).

At present, the 3-year limitation period runs from when the cause of action arose.

The new 3-year limitation period runs from the date the contravention was discovered or ought reasonably to have been discovered. However, no such action may be commenced 10 years or more after the date of the contravention.

The amendment is similar to the amendment to section 80 (5) (*see clause 6 (3)*).

*Clause 9* inserts a *new section 82A* in the principal Act, which enables the Court to order a person who has engaged in certain restrictive trade practices to pay exemplary damages even though the Court has made, or may make, an order under section 80 directing the person to pay a pecuniary penalty for the same conduct.

However, in determining whether to award exemplary damages, the Court must have regard to whether a pecuniary penalty has been imposed on the defendant in respect of the conduct concerned in the claim for exemplary damages and the amount of that pecuniary penalty.

*Clause 10* inserts a *new subsection (3A)* in section 88 of the principal Act (which sets out general provisions relating to the granting of injunctions).

The effect of the new subsection is that the Court must give such weight as it considers appropriate to the interests of consumers when it decides whether to grant an interim injunction under section 88.

*Clause 11* adds a *new subsection (5)* to section 103 of the principal Act (which relates to certain offences).

The new subsection provides that proceedings for an offence against subsection (4) may be commenced within 6 months after the contravention was discovered or ought reasonably to have been discovered.

*Clause 12* clarifies that nothing in the Bill, in particular, the new limitation periods—

- Enables any proceedings to be brought if those proceedings were already barred before the commencement of the Act; or
  - Affects any proceedings that were commenced before the commencement of the Act.
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*Hon Max Bradford*

## COMMERCE AMENDMENT

### ANALYSIS

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### A BILL INTITULED

#### **An Act to amend the Commerce Act 1986**

BE IT ENACTED by the Parliament of New Zealand as follows:

5     **1. Short Title and commencement**—(1) This Act may be cited as the Commerce Amendment Act 1999, and is part of the Commerce Act 1986\* (“the principal Act”).

(2) This Act comes into force on the day after the date on which this Act receives the Royal assent.

10    **2. Interpretation**—Section 2 (1) of the principal Act is amended by inserting, after the definition of the term “trade”, the following definition:

\*R.S. Vol. 31, p. 71  
Amendments: 1994, No. 135; 1996, No. 113

“‘Turnover’ has the same meaning as in section 2 (1) of the Financial Reporting Act 1993, except that every reference to an entity is a reference to a body corporate:”.

**3. Certain provisions of contracts, etc, with respect to prices, etc, deemed to substantially lessen competition—** 5

The principal Act is amended by repealing section 30, and substituting the following section:

“30. (1) Without limiting the generality of section 27, a provision of a contract, arrangement, or understanding is deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect, of— 10

“(a) Fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services; or 15

“(b) Fixing, controlling, maintaining, or coordinating, or providing for the fixing, controlling, maintaining, or coordinating, of bids or tenders for goods or services; or 20

“(c) Dividing, distributing, allocating, or apportioning, or providing for the dividing, distributing, allocating, or apportioning, of a market for goods or services on any basis, including customers, suppliers, territory, or time of sale; or 25

“(d) Limiting, or providing for the limiting, of the quantity of goods produced, processed, distributed, or sold, or restricting, or providing for the restricting, of the number, volume, or frequency of services offered. 30

“(2) In **subsection (1)**, ‘goods or services’ means goods or services that are—

“(a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or 35

“(b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other. 40

“(3) The reference in **subsection (2) (a)** to the supply or acquisition of goods or services by persons in competition with

each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.”

**4. Repeal of section 35**—Section 35 of the principal Act is repealed.

**5. New sections substituted**—The principal Act is amended by repealing section 59, and substituting the following sections:

**“59. Contracts or covenants subject to authorisation not prohibited under certain conditions**—(1) Despite anything in this Act, but subject to **section 59B**,—

“(a) A contract to which section 27 or section 29 applies may be entered into if the requirements of **subsection (2)** are complied with:

“(b) A covenant to which section 28 applies may be required to be given, or may be given, if the requirements of **subsection (2)** are complied with.

“(2) For the purposes of **subsection (1)**, the requirements that must be met are,—

“(a) In the case of a contract to which section 27 or section 29 applies, that the contract is subject to a condition that the provision, or exclusionary provision, as the case may be, does not come into force unless and until authorisation is granted to give effect to the provision, or exclusionary provision and that application must be made for that authorisation within 15 working days after the contract is entered into:

“(b) In the case of a covenant to which section 28 applies, that the covenant is subject to the condition that it does not have effect unless and until application is granted to give effect to it and that application must be made for that authorisation within 15 working days after the covenant is made.

**“59A. When Commission may grant authorisation**—

(1) The Commission may grant an authorisation to a person—

“(a) To enter into a contract or arrangement, or to arrive at an understanding, even though the contract or arrangement has been entered into, or the understanding has been arrived at, before the

Commission makes a determination in respect of the application for that authorisation; or

- “(b) To give effect to a provision of a contract or arrangement entered into, or an understanding arrived at, even though the applicant has already given, or is already giving, effect to the provision before the Commission makes a determination in respect of the application for that authorisation; or 5
- “(c) To require the giving of, or to give, a covenant even though the covenant has been given before the Commission makes a determination in respect of the application for that authorisation; or 10
- “(d) To do an act or engage in conduct referred to in section 37 or section 38 even though the applicant has already done the act or is already engaging in the conduct before the Commission makes a determination in respect of the application for that authorisation. 15

“(2) However, all of the parties to the contract, arrangement, or understanding must, unless and until authorisation is granted, discontinue— 20

“(a) Giving effect to the provision of the contract, arrangement, or understanding;

“(b) Engaging in conduct referred to in section 37 or section 38. 25

“59B. **Contraventions not prevented by granting of authorisation under section 59 or section 59A**—Nothing in section 59 or section 59A prevents conduct that occurred before an authorisation was granted in respect of it and that would otherwise have constituted a contravention of this Act from continuing to constitute a contravention.” 30

**6. Pecuniary penalties**—(1) Section 80 (1) of the principal Act is amended by omitting all the words after the word “appropriate”.

(2) Section 80 of the principal Act is amended by repealing subsection (2), and substituting the following subsections: 35

“(2) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—

“(a) In the case of an individual, \$500,000; or

“(b) In the case of a body corporate, the greater of— 40

“(i) \$5,000,000; or

“(ii) Three times the value of any commercial gain resulting, or expected to result, from the

5                   contravention if the Court is satisfied that the  
 contravention occurred in the course of producing,  
 or attempting to produce, a commercial gain, or, if  
 the commercial gain or expected commercial gain  
 cannot be readily ascertained, 10% of the turnover  
 of the body corporate and all of its interconnected  
 bodies corporate (if any).

10                   “(2A) The Court must order an individual who has engaged  
 in any conduct referred to in subsection (1) to pay a pecuniary  
 penalty, unless the Court considers that there is good reason  
 for not making such an order.

15                   “(2B) In determining an appropriate penalty under this  
 section, the Court must have regard to all relevant matters and,  
 in particular, the nature and extent of any commercial gain, or  
 any expected commercial gain, at the time of the  
 contravention.”

(3) Section 80 of the principal Act is amended by repealing  
 subsection (5), and substituting the following subsection:

20                   “(5) Proceedings under this section may be commenced  
 within 3 years after the date the contravention was discovered  
 or ought reasonably to have been discovered. However, no  
 proceedings under this section may be commenced 10 years or  
 more after the date of the contravention.”

25                   **7. New sections inserted**—The principal Act is amended  
 by inserting, after section 80, the following sections:

**“80A. Body corporate not to indemnify certain persons  
 in respect of pecuniary penalties**—(1) A body corporate  
 must not indemnify a director, servant, or agent of the body  
 corporate or an interconnected body corporate in respect of—

30                   “(a) Liability for payment of a pecuniary penalty under  
 section 80; or

                  “(b) Costs incurred by that director, servant, or agent in  
 defending or settling any proceeding relating to that  
 liability.

35                   “(2) An indemnity given in contravention of **subsection (1)** is  
 void.

                  “(3) However, a body corporate may, if expressly authorised  
 by its constitution or other document defining its constitution,  
 indemnify a director, servant, or agent of the body corporate  
 or an interconnected body corporate for any costs incurred by  
 him or her in any proceedings under section 80—

40                   “(a) That relate to liability for any act or omission in his or  
 her capacity as a director, servant, or agent; and



“(b) In which judgment is given in his or her favour, or which are discontinued.

“(4) In this section,—

“ ‘Agent’ includes a former agent:

“ ‘Director’ includes a former director: 5

“ ‘Indemnify’ includes relieve or excuse from liability, whether before or after the liability arises; and ‘indemnity’ has a corresponding meaning:

“ ‘Servant’ includes a former servant.

“**80B. Pecuniary penalties for contravention of section 80A**—(1) If the Court is satisfied on the application of the Commission that a body corporate has acted in contravention of **section 80A**, the Court may order the body corporate to pay to the Crown such pecuniary penalty as the Court determines to be appropriate. 10 15

“(2) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed 2 times the value of any indemnity given in contravention of **section 80A**.

“(3) The standard of proof in proceedings under this section is the standard of proof applying in civil proceedings. 20

“(4) In any proceedings under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.

“(5) Proceedings under this section may be commenced within 3 years after the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the date of the contravention. 25

“**80C. Court may order certain persons to be excluded from management of body corporate**—The Court may make an order that a person must not, without the leave of the Court, be a director or promoter of, or in any way, either directly or indirectly, be concerned or take part in the management of, a body corporate for a period not exceeding 5 years as may be specified in the order, if the Court is satisfied on the application of the Commission that— 30 35

“(a) The person has entered into a contract or arrangement, or arrived at an understanding, containing a provision that is deemed by **section 30 (1)** to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market: 40

“(b) The person has given effect to a provision of a contract, arrangement, or understanding that is deemed by **section 30 (1)** to have the purpose, or to have or to be

likely to have the effect, of substantially lessening competition in a market:

5 “(c) The person has entered into a contract, or arrangement, or arrived at an understanding, that contains an exclusionary provision:

“(d) The person has given effect to an exclusionary provision of a contract, arrangement, or understanding.

10 “80D. **Application for order under section 80c**—(1) The Commission must give not less than 10 days’ notice of its intention to apply for an order under **section 80c** to the person against whom the order is sought.

“**(2)** On the hearing of the Commission’s application or an application for leave by a person against whom an order under **section 80c** has been made,—

15 “(a) The Commission must appear and call the attention of the Court to any matter that seems to it to be relevant, and may give evidence or call witnesses; and

20 “(b) The person against whom the order is sought or has been made may appear and give evidence or call witnesses.

“**(3)** The Registrar of the Court must, as soon as practicable after the making of an order under **section 80c**, give notice of the order to—

25 “(a) The person against whom the order has been made; and

“**(b)** The Registrar of Companies, and the Registrar of Companies must give notice in the *Gazette* of the name of the person against whom the order is made.

30 “80E. **Offence to act in contravention of order made under section 80c**—(1) Every person commits an offence who acts in contravention of an order made under **section 80c**.

35 “**(2)** A person who commits an offence against **subsection (1)** is liable on conviction to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$200,000.

“**(3)** The offence is triable on indictment.”

**8. Actions for damages for contravention of Part II—**

Section 82 of the principal Act is amended by repealing subsection (2), and substituting the following subsection:

40 “**(2)** An action under subsection (1) may be commenced within 3 years after the date the contravention was discovered or ought reasonably to have been discovered. However, no

action under subsection (1) may be commenced 10 years or more after the date of the contravention.”

**9. Exemplary damages for contravention of Part II—**

The principal Act is amended by inserting, after section 82, the following section:

“82A. (1) The Court may order a person who has engaged in any conduct referred to in section 82 (1) to pay exemplary damages even though the Court has made, or may make, an order directing the person to pay a pecuniary penalty under section 80 for the same conduct.

“(2) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the Court must have regard to—

“(a) Whether a pecuniary penalty has been imposed on the defendant for a contravention involving the conduct concerned in the claim for exemplary damages; and

“(b) If so, the amount of the pecuniary penalty.”

**10. General provisions relating to granting of injunctions—**Section 88 of the principal Act is amended by renumbering subsection (3A) as (3B), and inserting before that subsection the following subsection:

“(3A) In determining whether to grant an interim injunction under this section, the Court must give such weight as the Court considers appropriate to the interests of consumers.”

**11. Offences—**Section 103 of the principal Act is amended by adding the following subsection:

“(5) Proceedings for an offence against subsection (4) may be commenced within 6 months after the contravention was discovered or ought reasonably to have been discovered.”

**12. Provisions as to proceedings already barred and pending proceedings—**Nothing in this Act—

(a) Enables any proceedings to be brought which were barred before the commencement of this Act; or

(b) Affects any proceedings commenced before the commencement of this Act.