



HOUSE OF REPRESENTATIVES

Supplementary Order Paper

Thursday, 29 July 1999

COMMERCE AMENDMENT BILL

Proposed Amendments

Hon MAX BRADFORD, in Committee, to move the following amendments:

Clause 1: To omit subclause (2) (lines 7 and 8 on page 1), and substitute the following subclauses:

(2) Sections 2 (4), 2A, 4C, and 4D come into force on 1 April 2000.

(3) The rest of this Act comes into force on the day after the date on which this Act receives the Royal assent.

Clause 2: To add, as subclauses (2) and (3) (after line 4 on page 2), the following subclauses:

(2) Section 2 (1) of the principal Act is amended by inserting, after the definition of the term "Commission", the following definition:

"'Commissioner' means a member of the Commission appointed under section 9 (3A):"

(3) Section 2 (1) of the principal Act is amended by repealing the definition of the term "Minister", and substituting the following definition:

"'Minister' means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act:"

(4) Section 2 (1A) of the principal Act is amended by omitting the expression "(except section 47 (3) and (4))".

New clauses 2A and 2B: To insert, after clause 2 (after line 4 on page 2), the following clauses:

2A. Certain terms defined in relation to competition—

(1) Section 3 (8) of the principal Act is amended by omitting the words "dominant influence" wherever they appear, and substituting in each case the words "high degree of market power".

(2) Section 3 of the principal Act is amended by repealing subsection (9), and substituting the following subsections:

“(9) For the purposes of sections 47 and 48, a person has, or 2 or more persons jointly have, as the case may be, a dominant position in a market if that person as a supplier or an acquirer, or those persons as suppliers or acquirers, of goods or services, is or are in a position to exercise a high degree of market power and for the purposes of determining whether a person is, or 2 or more persons jointly are, in a position to exercise a high degree of market power regard must be had to—

“(a) The extent to which that person is, or those persons are, constrained by the conduct of competitors or potential competitors in that market:

“(b) The extent to which that person is, or those persons are, constrained by the conduct of suppliers or acquirers of goods or services in that market.

“(10) For the purposes of determining whether (or the extent to which) 2 or more persons jointly are in a position to exercise market power regard must also be had to—

“(a) Any economic links between those persons; and

“(b) Any mutual or common constraints in competition between those persons.

“(11) A person does not have market power jointly with another person by reason only of the fact that—

“(a) Those persons are in competition with each other; or

“(b) One of them supplies goods or services to the other.

“(12) For the avoidance of doubt, a person or 2 or more persons may have a high degree of market power even if that person does not, or those persons do not, have a high share of the relevant market.”

2B. Membership of Commission—(1) Section 9 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

“(1) The Commission consists of not less than 5 and not more than 7 members, of whom at least 3 must be barristers or solicitors of at least 5 years’ standing.”

(2) Section 9 of the principal Act is amended by inserting, after subsection (3), the following subsections:

“(3A) Two members, both of whom must be barristers or solicitors, must be appointed for the sole purpose of hearing and determining applications for cease and desist orders in accordance with **sections 74A to 74C**.

“(3B) No member appointed under **subsection (3A)** may sit with the other members of the Commission.”

New clauses 4A to 4E: To insert, after clause 4 (after line 7 on page 3), the following clauses:

4A. Use of dominant position in market—Section 36 of the principal Act is amended by inserting, after subsection (1), the following subsection:

“(1A) For the purposes of this section,—

“(a) Every reference to use, in relation to a person’s dominant position in a market, is to be treated only as the causal connection between any of the purposes specified in subsection (1) (a) to (c) and the person’s dominant position:

“(b) The existence of any of the purposes specified in subsection (1) (a) to (c) may be inferred from the conduct of any relevant person or from other relevant circumstances.”

4B. Use of dominant position in trans-Tasman markets—Section 36A of the principal Act is amended by inserting, after subsection (1), the following subsection:

“(1A) For the purposes of this section,—

“(a) Every reference to use, in relation to a person’s dominant position in a market, in a market in Australia, or in a market in New Zealand and Australia, is to be treated only as the causal connection between any of the purposes specified in subsection (1) (d) to (f) and the person’s dominant position:

“(b) The existence of any of the purposes specified in subsection (1) (d) to (f) may be inferred from the conduct of any relevant person or from other relevant circumstances.”

4C. Certain acquisitions prohibited—(1) The principal Act is amended by repealing section 47, and substituting the following section:

“47. No person may acquire assets of a business or shares if, as a result of the acquisition,—

“(a) That person or 2 or more persons jointly would be, or would be likely to be, in a dominant position in a market; or

“(b) That person’s or 2 or more person’s dominant position in a market would be, or would be likely to be, strengthened.

(2) Sections 66 (3) (a) and (b) and 67 (3) of the principal Act are consequentially amended by omitting the expression “section 47 (1)”, and substituting the expression “**section 47**”.

4D. Bare transfer of market dominance excluded—The principal Act is amended by repealing section 48, and substituting the following section:

“48. Nothing in **section 47** applies to the bare transfer of a dominant position in a market from 1 person to another person.”

4E. Minister may seek advice from Commission as to price control—The principal Act is amended by inserting, after section 53, the following section:

“53A. The Minister may require the Commission to advise him or her on thresholds or criteria which, if breached or met, should lead to the imposition of price control.”

New clause 5A: To insert, after clause 5 (after line 31 on page 4), the following clause:

5A. New heading and sections inserted—(1) The principal Act is amended by inserting, before the heading above section 75, the following heading and sections:

“Cease and Desist Orders

74A. Commissioner may make cease and desist orders—(1) A Commissioner may make a cease and desist order, by consent or following a hearing held under **section 74B**, if the Commissioner is satisfied that—

“(a) A prima facie case has been made out that a person has engaged in any conduct referred to in section 80 (1) or section 83 (1); and

“(b) It is necessary to act urgently—

“(i) To prevent a particular person or consumers from suffering serious loss or damage:

“(ii) In the interests of the public.

“(2) Subject to **subsection (3) (a)**, the effect of a cease and desist order is to restrain conduct for such a period and on such terms as are specified in the order.

“(3) A cease and desist order made under **subsection (1)**—

“(a) May require a person to do something only if the Commissioner is satisfied that restraining the person from engaging in the conduct will not restore competition, or the potential for competition, in a market:

“(b) Must be in writing with the facts and reasons for it clearly set out:

“(c) Is deemed to be a determination of the Commission that is subject to appeal in accordance with sections 91 to 97.

“**74B. Investigation, notice, and opportunity to be heard**—A cease and desist order may be made under **section 74A** only if—

“(a) An investigation has been conducted into the alleged contravention of the Act and a report has been submitted to the Commission recommending that a cease and desist order be sought; and

“(b) The Commission agrees with the recommendation in the report and directs an officer of the Commission to make an application for a cease and desist order; and

“(c) The person against whom an order is sought is served with notice in writing of the following matters:

“(i) The nature of the alleged contravention:

“(ii) The terms of the proposed order:

“(iii) The reasons for the order; and

“(d) The person against whom an order is sought has an opportunity to—

“(i) Access the relevant information held by the Commission:

“(ii) Make a written submission:

“(iii) Consent to the terms of the proposed order or have the matter determined by a Commissioner following a hearing.

“**74C. Procedure at cease and desist hearing**—At every hearing for a cease and desist order, the Commissioner presiding over the hearing—

“(a) Must provide for as little formality and technicality as the requirements of this Act and a proper consideration of the matter permits:

“(b) Must permit the Commission and the person against whom an order is sought to appear and give evidence, to be represented by counsel, to call witnesses, and to cross-examine witnesses:

“(c) Has the necessary incidental powers in relation to the hearing of evidence including the power to exclude irrelevant or repetitive evidence and the powers set out in sections 99 and 100.

“74D. Pecuniary penalties for contravention of cease and desist order—(1) If the Court is satisfied on the application of the Commission that a person has acted in contravention of an order made under **section 74A**, the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate.

“(2) The amount of any pecuniary penalty must not exceed \$500,000.

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

“(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.”

(2) Section 92 of the principal Act is consequentially amended by adding the following paragraph:

“(f) In the case of an appeal against a determination of a Commissioner under **section 74A**, any person against whom a cease and desist order was made.”

New clause 9A: To insert, after clause 9 (after line 17 on page 8), the following clause:

9A. Contravention of section 55 an offence—Section 86 (1) of the principal Act is amended—

(a) By omitting from paragraph (a) the expression “\$10,000”, and substituting the expression “\$50,000”:

(b) By omitting from paragraph (b) the expression “\$30,000”, and substituting the expression “\$500,000”.

New clause 10A: To insert, after clause 10 (after line 24 on page 8), the following clause:

10A. Appeals in relation to determinations by Commission—(1) Section 91 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

“(1) Subject to sections 92 to 95, and to subsection (2),—

“(a) There is a right of appeal to the High Court against any determination of the Commission under this Act that is not a determination of the Commission under section 70:

“(b) There is a right of appeal to the High Court by way of case stated for the opinion of the Court on a question of law only against any determination of the Commission under section 70.”

(2) Section 93 of the principal Act is consequentially amended by inserting, after the word “appeal” in the first place where it appears, the words “(other than an appeal under **section 91 (1) (b)**)”.

EXPLANATORY NOTE

New clause 1 (2) and (3) relates to the commencement of the provisions relating to the substitution of *new section 3 (9) to (12)* and *new section 47* in the principal Act.

New clause 2 (2) is a consequential amendment arising out of the new cease and desist order provisions in *new clause 5A*.

New clause 2 (3) updates the definition of “Minister”.

New clause 2 (4) is a consequential amendment arising out of *new clause 4c (1)*, which replaces section 47 of the principal Act.

New clause 2A (1) amends section 3 (8) of the principal Act (which defines the concept of a dominant position in a market for the purposes of sections 36 and 36A).

One of the prerequisites for having a dominant position in a market is that a person must be in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market.

In considering whether a person is in a dominant position in a market for the purposes of section 36, the Courts have given the word “dominant” in the phrase “dominant influence” its ordinary meaning (see *Telecom v Commerce Commission* [1992] 3 NZLR 429). Subsequent cases have mitigated that to some extent.

New clause 2A (1), which replaces the words “dominant influence” with the words “high degree of market power” in section 3 (8), is intended to fully clarify that dominance is an economic test.

New clause 2A (2), which substitutes *new section 3 (9) to (12)* in the principal Act is related to the amendment to section 3 (8) and the replacement of section 47 of the principal Act by *new clause 4c (1)*.

New clause 4A inserts a *new subsection (1A)* in section 36 of the principal Act (which prohibits a person who has a dominant position in a market from using that position for certain specified purposes).

New subsection (1A) clarifies—

- That the reference to use is intended only to connect the purposes specified in subsection (1) with a person’s dominant position in a market;
- That an objective test may be used to establish the existence of any of those purposes.

New clause 4B inserts a *new subsection (1A)* in section 36A of the principal Act (which prohibits a person who has a dominant position in a trans-Tasman market from using that position for certain specified purposes).

The amendments in *new clause 4B* are similar to the amendments in *new clause 4A*.

New clause 4c (1) substitutes *new section 47* in the principal Act (which prohibits certain acquisitions).

New section 47 provides that no person may acquire assets of a business or shares if the acquisition would result in—

- That person or 2 or more persons jointly being in a dominant position in a market; or
- That person’s or 2 or more person’s dominant position in a market being strengthened.

New clause 4c (2) is a consequential amendment arising out of the amendment in *subclause (1)*.

New clause 4D, which replaces section 48, is a consequential amendment arising out of *new section 47*.

New clause 4E inserts a *new section 53A* in the principal Act, which provides that the Minister may require the Commission to advise him or her on thresholds or criteria which, if breached or met, should lead to the imposition of price control.

New clause 5A inserts *new sections 74A to 74D* in the principal Act, which relate to cease and desist orders that may be made by a Commissioner in certain circumstances.

New clause 9A increases the penalties under section 86 (1) of the principal Act for a contravention of section 55 (which provides that controlled goods or services are to be supplied only in accordance with the authorised price).

The maximum fine for an individual is increased from \$10,000 to \$50,000.

The maximum fine for a body corporate is increased from \$30,000 to \$500,000.

New clause 10A substitutes *new subsection (1)* in section 91 of the principal Act (which relates to appeals from determinations of the Commission under the Act).

New subsection (1) limits the existing appeal rights to determinations of the Commission under the Act that are not determinations under section 70 (price control determinations).

For determinations under section 70, which involve consideration of highly technical matters, the right of appeal is limited to an appeal to the High Court by way of case stated for the opinion of the Court on a question of law only.

Judicial review, however, will still be available for determinations of the Commission under section 70.