

House of Representatives

Supplementary Order Paper

Wednesday, 5 July 2017

Commerce (Cartels and Other Matters) Amendment Bill

Proposed amendments for the consideration of the Committee of the whole House

Key:

- **this is inserted text**
- **~~this is deleted text~~**

Note: This Supplementary Order Paper shows amendments to the Bill that are being proposed by the Minister for the purposes of consideration in Committee of the whole House. This document does—

- **NOT have official status in terms of unamended text**
- **NOT have the status of an as-reported version of the Bill.**

Explanatory note

This Supplementary Order Paper amends the Commerce (Cartels and Other Matters) Amendment Bill (the **Bill**). It replaces, and largely restates, those amendments to the Bill contained in Supplementary Order Papers 68, 148, and 407. Those amendments include—

- repealing section 4(3) of the Commerce Act 1986 (the **Act**), which extends the prohibition of certain acquisitions that lessen competition to acquisitions made outside New Zealand (*see clause 5(3)*). Overseas acquisitions that lessen competition in New Zealand will instead be dealt with by *new section 47A* (*see clause 8*):
- changing the definition of controlling interest in *new section 47A* to include the holding of assets (*see clause 8*):
- deleting *clause 18* of the Bill to remove criminal sanctions for cartel behaviour:
- amending the regulation-making power in section 108 of the Act so that refunds can be given for fees paid in relation to clearances (*see clause 22A*):
- inserting transitional provisions to provide that certain proceedings relating to cartel provisions cannot be brought in relation to conduct during the 9-month period following the commencement of *new section 30*. However, during this 9-month period, certain proceedings may be commenced as if sections 30 to 33 of the Act, which relate to price fixing and are repealed by *clause 7* of the Bill, were still in force (*see Schedule 2, new Schedule 1AA, Part 1, clause 2*).

The Supplementary Order Paper also makes further changes to the Bill. It provides, for certain persons co-operating to supply an international liner shipping service, exceptions from—

- the prohibition, under section 27 of the Act, of provisions substantially lessening competition; and
- the prohibition of cartel provisions inserted by *clause 7* of the Bill (*see clause 7B*).

The exceptions for persons supplying international liner shipping services come into force 2 years after the date on which the Bill receives the Royal assent. This aligns with the date on which the Bill repeals the general exception for international shipping contained in section 44(2) of the Act.

The further changes also include amendments to—

- enable the High Court, if acquisition by an overseas person of a controlling interest in a New Zealand body corporate has the effect or likely effect of lessening competition, to make orders in respect of any other New Zealand bodies corporate in which that overseas person has an interest (*see clause 8*):
- enable a person to give effect to a cartel provision that is a restraint of trade where that provision relates to an earlier collaborative activity (*see clause 7, new section 31(1B)*):
- correct minor errors and improve clarity:

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- reflect current drafting practice for transitional and savings provisions.

Departmental disclosure statement

The Ministry of Business, Innovation, and Employment is required to prepare a disclosure statement to assist with the scrutiny of this Supplementary Order Paper. It provides access to information about any material policy changes to the Bill and identifies any new significant or unusual legislative features of the Bill as amended.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=sop&subtype=government&year=2017&no=343&>

Regulatory impact statement

The Ministry of Business, Innovation, and Employment produced a regulatory impact statement on 3 November 2016 to help inform the new policy decisions taken by the Government relating to the contents of this SOP.

A copy of this regulatory impact statement can be found at—

- <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation>
- <http://www.treasury.govt.nz/publications/informationreleases/ris>

The Honourable Jacqui Dean, in Committee, to propose the amendments shown in the following document.

Hon Jacqui Dean

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Government Bill

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cl 1

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Commerce (Cartels and Other Matters) Amendment Act **2011**.

2 Commencement

- (1) This Act, ~~except sections 18, 23A, and 23B~~, comes into force on the day after the date on which it receives the Royal assent.
- (2) ~~Section 18 (which imposes criminal sanctions in respect of certain conduct relating to cartels) and sections 23A and 23B (which relate to the repeal of parts of the Shipping Act 1987)~~ However, the following sections (which relate to the insertion into the principal Act of new sections relating to international shipping and the repeal of parts of the Shipping Act 1987) come into force on the day that is 2 years after the date on which this Act receives the Royal assent:
- (a) **sections 7A and 7B:**
 - (b) **sections 23A and 23B.**

3 Principal Act amended

This Act amends the Commerce Act 1986 (the principal Act).

Part 1

Substantive amendments to principal Act

4 Interpretation

Section 2(1) is amended by inserting the following definitions in their appropriate alphabetical order:

cartel provision means a provision described in **section 30A(1)**

collaborative activity has the meaning given in **section 31(2)**

international liner shipping service—

- (a) means a service exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand, or from a place outside New Zealand to a place in New Zealand, that—
 - (i) operates at regular intervals on a fixed route or fixed routes in accordance with an advertised schedule; and
 - (ii) is supplied, as its capacity allows, to any paying customer; but
- (b) excludes a service for the carriage of goods to or from a ship or the loading or unloading of a ship

market allocating has the meaning given in **section 30A(4)**

price fixing has the meaning given in **section 30A(2)**

restricting output has the meaning given in **section 30A(3)**

Jurisdiction

5 Application of Act to conduct outside New Zealand

- (1) The heading to section 4 is amended by omitting “**to conduct outside New Zealand**”.
- (2) Section 4 is amended by inserting the following subsection before subsection (1):

(1AA) For the purposes of this Act,—

- (a) a person engages in conduct in New Zealand if any act or omission forming part of the conduct occurs in New Zealand; and
- (b) a person (**person A**) engages in conduct in New Zealand if another person (**person B**) engages in conduct in New Zealand, and the conduct of person B is deemed (by virtue of **section 90**) to be the conduct of person A.

- (3) Section 4(3) is repealed.

5A New section 6C inserted

The following section is inserted after section 6B:

6C Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in Schedule 1AA have effect according to their terms.

6 Section 29 repealed

Section 29 is repealed.

Cartels

7 New heading and sections 30 to 33 substituted

The heading above section 30, sections 30 to 34, and the heading below section 34 are repealed and the following heading and sections substituted:

Cartel provisions

30 Prohibition on entering into or giving effect to cartel provision

- (1) No person may, ~~unless an exemption in **section 31, 32, or 33** applies,—~~
 - (a) enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or
 - (b) give effect to a cartel provision.
- (2) ~~See section 80 for liability to a pecuniary penalty, and **section 82B** for criminal liability, for contravention of this section.~~

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Part 1 cl 7

30A Meaning of cartel provision and related terms

- (1) A **cartel provision** is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following in relation to the supply or acquisition of goods or services in New Zealand:
 - (a) price fixing;
 - (b) restricting output;
 - (c) market allocating.
- (2) In this Act, **price fixing** means, as between the parties to a contract, arrangement, or understanding, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—
 - (a) the price for goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
 - (b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other.
- (3) In this Act, **restricting output** means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of,—
 - (a) the production or likely production by any party to a contract, arrangement, or understanding of goods that any 2 or more of the parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
 - (b) the capacity or likely capacity of any party to a contract, arrangement, or understanding to supply services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or
 - (c) the supply or likely supply of goods or services that any 2 or more parties to a contract, arrangement, or understanding supply in competition with each other; or
 - (d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a contract, arrangement, or understanding acquire in competition with each other.
- (4) In this Act, **market allocating** means allocating between any 2 or more parties to a contract, arrangement, or understanding, or providing for such an allocation of, either or both of the following:
 - (a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other;
 - (b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.

30B Additional interpretation relating to cartel provisions

In this Act, in relation to a cartel provision,—

- (a) if a person is a party to a contract, arrangement, or understanding, each of the person's interconnected bodies corporate is taken to be a party to the contract, arrangement, or understanding; and
- (b) if a person (**person A**) or any of person A's interconnected bodies corporate supplies or acquires goods or services in competition with another person (**person B**) or any of person B's interconnected bodies corporate, person A is taken to supply or acquire those goods or services in competition with person B; and
- (c) a reference to persons in competition with each other for the supply or acquisition of goods or services includes a reference to—
 - (i) persons who are, or are likely to be, in competition with each other in relation to the supply or acquisition of those goods or services; and
 - (ii) persons who, but for a cartel provision relating to those goods or services, would, or would be likely to, be in competition with each other in relation to the supply or acquisition of those goods or services.

30C Temporal application of cartel prohibition

- (1) ~~Section 30(1)(a) (which relates to entering into a contract or arrangement, or arriving at an understanding, that contains a cartel provision) applies only to contracts, arrangements, or understandings that are entered into or arrived at after section 30 comes into force.~~
- (2) ~~Section 30(1)(b) (which relates to giving effect to a cartel provision in a contract, arrangement, or understanding) applies only to conduct occurring after section 30 comes into force, but applies whether the contract, arrangement, or understanding was entered into or arrived at before or after that section comes into force, and whether or not it has been suspended at any time.~~
- (3) ~~Despite subsection (2), during the first 9 months after the date on which this section comes into force, no proceedings under section 80 may be commenced for a contravention of section 30(1)(b) in relation to a contract, arrangement, or understanding that was entered into or arrived at before this section came into force and that, at that time, contained or may have contained a cartel provision.~~
- (4) ~~However, during that 9-month period, proceedings under section 80 may be commenced in relation to a contract, arrangement, or understanding referred to in subsection (3) as if section 30, as it was before it was replaced by the Commerce (Cartels and Other Matters) Amendment Act 2011, was still in force.~~

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30D Cartel provisions generally unenforceable

(1) ~~No provision in a contract is enforceable if it has the purpose, effect, or likely effect of price fixing, restricting output, or market allocating (as those terms are defined in **section 30A**):~~

(1) No cartel provision is enforceable.

(2) However, nothing in **subsection (1)** affects the enforceability of a cartel provision in any contract to which **section 31, 32, ~~or 33~~ 33, 44A(4) and (5), or 44B** applies.

31 Exemption~~Exception~~ for collaborative activity

(1) ~~Nothing in **section 30** applies to a person who enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision, or who gives effect to a cartel provision in a contract, arrangement, or understanding, if, at the time of entering into the contract, arrangement, or understanding or giving effect to the cartel provision,—~~

(a) ~~the person and 1 or more parties to the contract, arrangement, or understanding are involved in a collaborative activity; and~~

(b) ~~the cartel provision is reasonably necessary for the purpose of the collaborative activity.~~

Exception for entering into cartel provision

(1) Nothing in **section 30(1)(a)** applies to a person in relation to a cartel provision if, at the time of entering into or arriving at the contract, arrangement, or understanding that contains the provision,—

(a) the person and 1 or more other parties to the contract, arrangement, or understanding are involved in a collaborative activity; and

(b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.

Exceptions for giving effect to cartel provision

(1A) Nothing in **section 30(1)(b)** applies to a person in relation to a cartel provision if, at the time of giving effect to the cartel provision,—

(a) the person and 1 or more other parties to the contract, arrangement, or understanding that contains the provision are involved in a collaborative activity; and

(b) the cartel provision is reasonably necessary for the purpose of the collaborative activity.

(1B) Nothing in **section 30(1)(b)** applies to a person in relation to a cartel provision that constitutes a restraint of trade if—

(a) the person and 1 or more other parties to the contract, arrangement, or understanding were involved in a collaborative activity that has ended; and

- (b) the cartel provision was reasonably necessary for the purpose of the collaborative activity; and
- (c) the collaborative activity did not end because the lessening of competition between any 2 or more parties became its dominant purpose.

Meaning of collaborative activity

- (2) In this Act, **collaborative activity** means an enterprise, venture, or other activity, in trade, that—
 - (a) is carried on in co-operation by 2 or more persons; and
 - (b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.
- (3) The purpose referred to in **subsection (2)(b)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

32 Exemption—Exception for vertical supply contracts

- (1) Nothing in **section 30** applies to a person ~~who enters into a contract that contains a cartel provision, or who gives effect in relation to a cartel provision in a contract, if—~~
 - (a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and
 - (b) the cartel provision—
 - (i) relates to the supply or likely supply of the goods or services to the customer or likely customer, ~~or to the maximum including to the maximum~~ price at which the customer or likely customer may resupply the goods or services; and
 - (ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.
- (2) The purpose referred to in **subsection (1)(b)(ii)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

33 Exemption—Exception for joint buying and promotion agreements

A provision in a contract, arrangement, or understanding does not have the purpose, effect, or likely effect of price fixing ~~(as defined in **section 30A(2)**)~~ if the provision—

- (a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by some or all of the parties to the contract, arrangement, or understanding; or
- (b) provides for joint advertising of the price for the resupply of goods or services acquired in accordance with **paragraph (a)**; or
- (c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or

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Part 1 cl 7A

- (d) provides for an intermediary to take title to goods and resell or resupply them to another party to the contract, arrangement, or understanding.

7A New heading inserted

The following heading is inserted above section 43.

Exceptions to Part 2

7B New sections 44A and 44B inserted

The following sections are inserted after section 44:

44A Exceptions in relation to international liner shipping services

- (1) Nothing in section 27(1) applies to a person in relation to a provision of a contract, arrangement, or understanding if, at the time of entering into or arriving at the contract, arrangement, or understanding, the circumstances in **subsection (6)** apply.
- (2) Nothing in section 27(2) applies to a person in relation to a provision of a contract, arrangement, or understanding if, at the time of giving effect to the provision, the circumstances in **subsection (6)** apply.
- (3) Nothing in section 27(4) affects the enforceability of a provision in any contract to which **subsection (1) or (2)** applies.
- (4) Nothing in **section 30(1)(a)** applies to a person in relation to a cartel provision that has the effect, or likely effect, of restricting output or market allocating if, at the time of entering into or arriving at the contract, arrangement, or understanding that contains the provision, the circumstances in **subsection (6)** apply.
- (5) Nothing in **section 30(1)(b)** applies to a person in relation to a cartel provision that has the effect, or likely effect, of restricting output or market allocating if, at the time of giving effect to the provision, the circumstances in **subsection (6)** apply.
- (6) The circumstances are that—
 - (a) the person and all other parties to the contract, arrangement, or understanding that contains the provision are supplying an international liner shipping service in co-operation with each other; and
 - (b) the co-operation improves the service supplied to owners or consignors of goods carried at sea; and
 - (c) the provision relates to—
 - (i) a specified activity carried out for the purposes of the co-operation; or
 - (ii) an activity ancillary to a specified activity that is reasonably necessary for the purposes of the co-operation.

- (7) For the purposes of **subsection (6)(a), parties to the contract, arrangement, or understanding** excludes persons who are parties only because **section 30B(a)** applies.
- (8) In this section,—
specified activity means any of the following:
- (a) the co-ordination of schedules and the determination of port calls:
 - (b) the exchange, sale, hire, or lease (including the sublease) of space on a ship:
 - (c) the pooling of ships to operate a network:
 - (d) the sharing or exchanging of equipment such as containers:
 - (e) capacity adjustments in response to fluctuations in supply and demand for international liner shipping services.
- 44B Further exception in relation to international liner shipping services (price fixing in relation to space on ship)**
- (1) Nothing in **section 30(1)(a)** applies to a person in relation to a cartel provision that has the effect, or likely effect, of price fixing if, at the time of entering into or arriving at the contract, arrangement, or understanding that contains the provision, the circumstances in **subsection (3)** apply.
- (2) Nothing in **section 30(1)(b)** applies to a person in relation to a cartel provision that has the effect, or likely effect, of price fixing if, at the time of giving effect to the provision, the circumstances in **subsection (3)** apply.
- (3) The circumstances are that—
- (a) the person and all other parties to the contract, arrangement, or understanding that contains the cartel provision are supplying an international liner shipping service in co-operation with each other; and
 - (b) the co-operation improves the service supplied to owners or consignors of goods carried at sea; and
 - (c) the provision relates to the exchange, sale, hire, or lease (including the sublease) of space on a ship between the person and 1 or more parties to the contract, arrangement, or understanding; and
 - (d) the exchange, sale, hire, or lease (including the sublease) is carried out for the purposes of the co-operation.
- (4) For the purposes of **subsection (3)(a), parties to the contract, arrangement, or understanding** excludes persons who are parties only because **section 30B(a)** applies.

Acquisitions by overseas persons

8 New sections 47A to 47D inserted

The following sections are inserted after section 47:

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Part 1 cl 8

47A Declaration relating to acquisition by overseas person

- (1) The Commission may apply to the High Court for a declaration under this section if an overseas person acquires, whether directly or indirectly, a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares.
- ~~(2) The High Court may make a declaration that it is satisfied that the acquisition of shares by the overseas person has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.~~
- (2) The High Court may make a declaration that it is satisfied that—
 - (a) the overseas person has acquired a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares; and
 - (b) the acquisition of that controlling interest has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.
- (3) A declaration may not be made in respect of an acquisition if—
 - (a) the application for the declaration is made more than 12 months after the date of the acquisition; or
 - (b) the Commission has given a clearance, or granted an authorisation, under Part 5, in respect of the acquisition (*see section 69*).
- (3A) Nothing in this section limits the Commission's functions or powers under any other provision of this Act.
- (4) In this section and in **sections 47B to 47D**,—

controlling interest means, in the context of an overseas person having a controlling interest in a New Zealand body corporate, that the overseas person—

 - (a) controls the composition of the board of the body corporate; or
 - (b) is in a position to exercise, or control the exercise of, more than 20% of the maximum number of votes that can be exercised at a meeting of the body corporate; or
 - (c) holds more than 20% of the issued shares of the body corporate, other than shares that carry no right to participate beyond an entitlement to a specified amount in a distribution of either profits or capital; or
 - (d) is entitled to receive more than 20% of every dividend paid on shares issued by the body corporate, other than shares that carry no right to participate beyond an entitlement to a specified amount in a distribution of either profits or capital; or
 - (e) is the holding company (as defined in section 5(2) of the Companies Act 1993) of the body corporate; or
 - (f) holds assets in circumstances where the holding of those assets results in the overseas person having effective control of the body corporate

New Zealand body corporate means a body corporate (whether incorporated overseas or in New Zealand) that carries on business in New Zealand

overseas person means a person, whether a body corporate or otherwise, that is neither resident nor carrying on business in New Zealand.

47B Orders against New Zealand bodies corporate following declaration under section 47A

(1AA) The Commission may apply to the High Court for an order under this section in respect of a New Zealand body corporate—

- (a) at the same time as the Commission applies for a declaration under **section 47A** in relation to an overseas person who has a controlling interest in the body corporate; or
 - (b) at any time while that application is pending or after the declaration has been made.
- (1) If the High Court makes a declaration under **section 47A** in relation to ~~a New Zealand body corporate~~ an overseas person, it may make an order under this section requiring ~~the any~~ the any New Zealand body corporate in which the person has a controlling interest to—
- (a) cease carrying on business in New Zealand, in the market to which the declaration relates, no later than 6 months after the date of the declaration or any longer period specified by the court; or
 - (b) dispose of shares or other assets specified by the court; or
 - (c) take any other action (including disposing of shares or other assets) that the court considers, in all the circumstances, is consistent with the purpose of this Act.
- (2) Contravention of an order made under this section is ~~deemed to be a~~ contravention of this section.

47C Application by Commission for declaration or order

- (1) An application for a declaration under **section 47A**, or for an order under **section 47B**, may be made only by the Commission.
- (2) On making an application under **section 47A**, the Commission must give notice of the application to the relevant overseas person and New Zealand body corporate.
- (3) On making an application under **section 47B**, the Commission must give notice to any New Zealand body corporate to which the application relates.

47D Revocation and variation of declarations and orders

- ~~(1) The Commission, or the overseas person or New Zealand body corporate that a declaration made under **section 47A** relates to, may apply to the High Court at any time to revoke the declaration, revoke or vary the order, or both.~~

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Part 1 cl 9

- (1) The Commission, or the overseas person or New Zealand body corporate to which a declaration made under **section 47A** relates, may apply to the High Court to have the declaration revoked.
- (1A) The Commission, or the overseas person or any New Zealand body corporate to which an order under **section 47B** relates, may apply to the High Court to have the order revoked or varied.
- (2) The High Court may, if it is satisfied that there has been a material change of circumstances, do either or both of the following:
 - (a) revoke ~~the a~~ declaration:
 - (b) revoke or vary any order.

Amendments relating to authorisations for restrictive trade practices

9 Effect of authorisation

- (1) Section 58A(1) is amended by omitting all the words before paragraph (a) and substituting “While an authorisation under section 58(1) remains in force, nothing in section 27, **30, or 30D** prevents an applicant from—”.
- (2) Section 58A(2) is amended by omitting all the words before paragraph (a) and substituting “While an authorisation under section 58(2) remains in force, nothing in section 27, **30, or 30D** prevents an applicant from—”.
- (3) Section 58A is amended by adding the following subsection:
- (7) ~~Subsections (1) and (2) apply to an authorisation that is given either before or after the Commerce (Cartels and Other Matters) Amendment Act **2011** comes into force.~~

10 When Commission may grant authorisation

Section 59A is amended by repealing subsections (2) and (3).

10A Procedure for applications for authorisation of restrictive trade practices

Section 60 is amended by inserting the following subsection after subsection (3):

- (3A) In relation to any application, the Commission may consult with any person who, in the opinion of the Commission, is able to assist it to determine the application.

10B Determination of applications for authorisation of restrictive trade practices

- (1) Section 61 is amended by inserting the following subsection after subsection (1):
- (1A) If authorisation is not granted within 120 working days after the date on which the application is registered, the Commission is deemed to have declined the

application, subject to any alternative timetable agreed between the Commission and the applicant.

- (2) Section 61(6) is amended by omitting “or is deemed to result”.

11 Commission to prepare draft determination in relation to restrictive trade practices

- (1) Section 62 is amended by repealing subsections (3), (4), and (5).
- (2) Section 62(6) is amended by omitting “The Commission may, of its own motion, determine to hold a conference in relation to the draft determination and” and substituting “Before determining the application, the Commission may determine to hold a conference and, if so,”.
- (3) Section 62(7) is amended by inserting “, if appropriate,” after “and may prepare a single draft determination in relation to the applications and”.

Clearance regime for collaborative activities

12 New sections 65A to 65D inserted

The following sections are inserted after section 65:

65A Commission may give clearances relating to cartel provisions

- (1) A person who proposes to enter into a contract or arrangement, or arrive at an understanding, that contains, or may contain, a cartel provision may apply to the Commission for a clearance under this section.
- (2) The Commission must give a clearance under this section if it is satisfied that—
- (a) the applicant and any other party to the proposed contract, arrangement, or understanding are or will be involved in a collaborative activity; and
 - (b) every cartel provision in the contract, arrangement, or understanding is reasonably necessary for the purpose of the collaborative activity; and
 - (c) entering into the contract or arrangement, or arriving at the understanding, or giving effect to any provision of the contract, arrangement, or understanding, will not have, or would not be likely to have, the effect of substantially lessening competition in a market.
- (3) For the purpose of **subsection (2)**, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision, providing there are reasonable grounds for believing it might be.
- (4) If clearance is not given within 30 working days after the date on which the application is registered in accordance with section 60(2)(a), the Commission is deemed to have declined to give the clearance, subject to any alternative timetable agreed between the Commission and the person applying for clearance.

65B Effect of clearance under section 65A

The effect of a clearance given under **section 65A** is that—

- (a) a party to the contract, arrangement, or understanding to which the clearance relates does not contravene section 27 or **30** by entering into the contract or arrangement, or arriving at the understanding; and
- (b) a person does not contravene section 27 or **30** by giving effect to any cartel provision in the contract, arrangement, or understanding to which the clearance relates; and
- (c) **section 30D(1)** does not apply to any cartel provision in the contract, arrangement, or understanding.

65C Procedures relating to clearances

- (1) Section 60 (except subsections (2)(c) and (3)) applies to an application for a clearance under **section 65A** in the same way as it applies to an application for an authorisation made under section 58.
- (2) Every clearance given under **section 65A** must be given by way of written notice to the applicant.

65D Revocation of clearances

- (1) The Commission may revoke a clearance given under **section 65A** if it is satisfied that—
 - (a) the clearance was given on information that was false or misleading in a material particular; or
 - (b) there has been a material change of circumstances.
- (2) The Commission must not revoke a clearance unless the person to whom the clearance was given, and any other person who in the opinion of the Commission is likely to have an interest in the matter, is given a reasonable opportunity to make submissions to the Commission and the Commission has had regard to those submissions.

Amendment relating to clearance for business acquisitions

13 Commission may give clearances for business acquisitions

Section 66(3) is amended by omitting “10 working days” and substituting “40 working days”.

13AA Effect of clearance or authorisation

Section 69 is amended by omitting “section 27 or section 47” and substituting “section 27, 47, or **47A**”.

Lay members of High Court

13A Lay members of High Court in certain cases

- (1) Section 78(1) is amended by omitting “the exercise by the High Court of its jurisdiction and powers under sections 80 to 85 in respect of proceedings which relate to any of sections 27 to 29, 36, 36A, 37, 38, or 47” and substituting “the exercise by the High Court of its civil jurisdiction under **section 47A, 47B, or 47D** or sections 80 to 85 in respect of proceedings that relate to section 27, 28, **30**, 36, 36A, 37, 38, 47, or **47B**”.
- (2) Section 78(4)(b) is repealed.

Pecuniary penalties generally

13B Relationship between pecuniary penalties and criminal liability

- (1) ~~Section 79B(1) is amended by omitting “section 86B or 87B” and substituting “any provision of this Part”.~~
- (2) ~~Section 79B(2) is amended by omitting “section 86B or 87B” and substituting “any provision of this Part”.~~
- (3) Section 79B is amended by adding the following subsection:
- (3) Any uncompleted proceedings for an order under this Act that a person pay a pecuniary penalty must be stayed if criminal proceedings are started or have already been started against the person for the same act or omission, or substantially the same act or omission, in respect of which the pecuniary penalty order is sought.

Amendments relating to penalties for cartels

14 Pecuniary penalties

- (1) The heading to section 80 is amended by adding “**relating to restrictive trade practices**”.
- (2) Section 80(2B) is amended by repealing paragraph (b) and substituting the following paragraph:
 - (b) in any other case, the greater of the following:
 - (i) \$10 million;
 - (ii) either,—
 - (A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or
 - (B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bod-

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ies corporate (if any) in each accounting period in which the contravention occurred.

- (3) Section 80 is amended by inserting the following subsection after subsection (2B):
- (2C) In proceedings relating to a contravention of **section 30**, if the defendant claims that an ~~exemption~~ exception in **section 31, 32, or 33** applies, it is for the defendant to prove, on the balance of probabilities, that the relevant ~~exemption~~ exception applies.

15 New section 80A substituted

Section 80A is repealed and the following section substituted:

80A Restriction on indemnities relating to contraventions of section 30

- (1) A body corporate must not indemnify any director, employee, or agent, or former director, employee, or agent, of the body corporate or of any of its interconnected bodies corporate (**person A**) in respect of—
- (a) any pecuniary penalty imposed on person A by the court under section 80 in respect of a contravention of **section 30**; or
 - (b) any ~~penalty imposed on person A by the court following the conviction of person A under **section 82B**; or~~
 - (c) any costs incurred by person A in defending any civil proceedings in which the pecuniary penalty referred to in **paragraph (a)** is imposed ~~or any criminal proceedings in which person A is convicted as described in **paragraph (b)**.~~
- (2) An indemnity given in contravention of **subsection (1)** is void.
- (3) In this section, **indemnify** includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning.

16 Court may order certain persons to be excluded from management of body corporate

- (1) Section 80C is amended by omitting “that—” and substituting “that the person has, in contravention of **section 30**,—”.
- (2) Section 80C is amended by repealing paragraphs (a) to (d) and substituting the following paragraphs:
- (a) entered into a contract or arrangement, or has arrived at an understanding, that contains a cartel provision; or
 - (b) given effect to a contract, arrangement, or understanding that contains a cartel provision.

17 Exemplary damages for contravention of Part 2

Section 82A is amended by adding the following subsection:

- (3) ~~The court may not order a person to pay exemplary damages in relation to conduct for which the person has been convicted of an offence under **section 82B**.~~

18 New section 82B inserted

The following section is inserted after section 82A:

82B Offence relating to cartel prohibition

- (1) A person commits an offence if —
- (a) the person, —
 - (i) ~~in contravention of **section 30**, enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision; and~~
 - (ii) ~~intends, at that time, to engage in price fixing, restricting output, or market allocating (as those terms are defined in **section 30A**);~~
or
 - (b) the person, —
 - (i) ~~in contravention of **section 30**, gives effect to a contract, arrangement, or understanding that contains a cartel provision; and~~
 - (ii) ~~intends, at the time the contract, arrangement, or understanding is given effect to, to engage in price fixing, restricting output, or market allocating (as those terms are defined in **section 30A**).~~
- (2) In a prosecution under this section, it is a defence, for a defendant involved in a collaborative activity, if —
- (a) ~~the defendant honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity; and~~
 - (b) ~~that belief existed at the time the defendant entered into or arrived at the contract, arrangement, or understanding that contained the cartel provision, or at the time the defendant gave effect to the cartel provision, as the case requires.~~
- (3) A defendant that wishes to claim that an exemption in **section 31, 32, or 33** applies, or to rely on the defence in **subsection (2)**, must —
- (a) ~~notify the prosecution of that fact within 1 month after the date on which the defendant is committed for trial for the offence; and~~
 - (b) ~~at the same time, provide sufficient details about the application of the relevant section to fully and fairly inform the prosecution of the manner in which the exemption or defence is claimed to apply.~~
- (4) ~~An individual who commits an offence against this section is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.~~

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- (5) ~~A person, not being an individual, that commits an offence against this section is liable on conviction on indictment to a fine of the greater of the following:~~
- ~~(a) \$10 million;~~
 - ~~(b) either,—~~
 - ~~(i) if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or~~
 - ~~(ii) if the commercial gain cannot be readily ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.~~

Amendments relating to acquisitions by overseas persons

19 Pecuniary penalties

- (1) The heading to section 83 is amended by adding “**relating to business acquisitions**”.
- (2) Section 83 is amended by repealing subsection (1) and substituting the following subsections:

- (1) The court may, on the application of the Commission, order a person to pay a pecuniary penalty to the Crown if the court is satisfied that the person—
 - (a) has contravened section 47 or **47B**; or
 - (b) has attempted to contravene either of those sections; or
 - (c) has aided, abetted, counselled, or procured any other person to contravene either of those sections; or
 - (d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene either of those sections; or
 - (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of either of those sections; or
 - (f) has conspired with any other person to contravene either of those sections.
- (1A) The amount of pecuniary penalty must not, in respect of each act or omission, exceed \$500,000 in the case of an individual, or \$5 million in any other case.

19A Actions for damages for contravention of Part 3

Section 84A is amended by repealing subsection (1) and substituting the following subsection:

- (1) Every person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following:

- (a) a contravention of section 47 or **47B**:
- (b) aiding, abetting, counselling, or procuring the contravention of section 47 or **47B**:
- (c) inducing by threats, promises, or otherwise the contravention of section 47 or **47B**:
- (d) being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of section 47 or **47B**:
- (e) conspiring with any other person in the contravention of section 47 or **47B**.

Attributing conduct

20 New section 90 substituted

Section 90 is repealed and the following section substituted:

90 Conduct by employees, agents, and others

- (1) In proceedings under this Part in respect of conduct engaged in by a person other than an individual (**person A**), if it is necessary to establish the state of mind of person A it is sufficient to show that a director, employee, or agent of person A, acting within the scope of the director's, employee's, or agent's actual or apparent authority, had that state of mind.
- (2) Conduct by a person (**person B**) is deemed for the purposes of this Act also to be the conduct of a person other than an individual (**person A**) if, at the time of the conduct,—
 - (a) person B was a director, employee, or agent of person A, acting within the scope of person B's actual or apparent authority; or
 - (b) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of a director, employee, or agent of person A who was acting within the scope of the director's, employee's, or agent's actual or apparent authority.
- (3) In civil proceedings under this Part in respect of conduct engaged in by an individual (**person C**), if it is necessary to establish the state of mind of person C it is sufficient to show that an employee or agent of person C, acting within the scope of the employee's or agent's actual or apparent authority, had that state of mind.
- (4) In civil proceedings under this Part, conduct by a person (**person B**) is deemed for the purposes of this Act also to be the conduct of an individual (**person C**) if, at the time of the conduct,—
 - (a) person B was acting at the direction, or with the consent or agreement (express or implied), of person C; or

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- (b) person B was an employee or agent of person C and acting within the scope of person B's actual or apparent authority; or
 - (c) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of an employee or agent of person C who was acting within the scope of the employee's or agent's actual or apparent authority.
- (5) A reference in this section to the state of mind of a person includes a reference to—
- (a) the knowledge, intention, opinion, belief, or purpose of the person and the person's reasons for that intention, opinion, belief, or purpose; and
 - (b) the state of mind of a person outside New Zealand.

Appeals relating to authorisations and clearances

21 Persons entitled to appeal

- (1) Section 92 is amended by repealing paragraph (a) and substituting the following paragraph:

- (a) in the case of an appeal against a determination of the Commission in relation to an application for an authorisation under section 58 or 67, the applicant and any other person who—
 - (i) has a direct and significant interest in the application; and
 - (ii) participated in the Commission's processes leading up to the determination:

- (1A) Section 92 is amended by inserting the following paragraph after paragraph (b):

- (ba) in the case of an appeal against a determination of the Commission under **section 65A**,—
 - (i) the person who applied for the clearance; and
 - (ii) any other person who is a party to the contract, arrangement, or understanding to which the application for clearance relates:

- (2) Section 92 is amended by repealing paragraph (c) and substituting the following paragraph:

- (c) in the case of an appeal against a determination of the Commission under section 66 in relation to a notice seeking a clearance,—
 - (i) the person who sought the clearance; and
 - (ii) any person whose assets, or the shares in which, are proposed to be acquired pursuant to the clearance:

- ~~(3) Section 92 is amended by inserting the following paragraph after paragraph (c):~~

- ~~(ca) in the case of an appeal against a determination of the Commission under **section 65A**,—~~

- (i) the person who applied for the clearance; and
- (ii) any other person who is a party to the contract, arrangement, or understanding to which the application for clearance relates:

21A Commission may require person to supply information or documents or give evidence

Section 98 is amended by inserting the following subsection as subsection (2):

- (2) For the purposes of **subsection (1)**, the Commission's powers under this Act include the power to investigate whether an exception or exemption from this Act (whether under this Act or any other enactment) applies to a person or to a person's conduct.

Increasing penalties

22 Offences

- (1) Section 103 is amended by repealing subsection (4) and substituting the following subsection:
- (4) A person who contravenes subsection (1), (2), or (3) commits an offence and is liable on summary conviction to,—
 - (a) in the case of an individual, a fine not exceeding \$100,000;
 - (b) in any other case, a fine not exceeding \$300,000.
- (2) Section 103(5) is amended by omitting “6 months” and substituting “3 years”.

Regulations

22A Regulations

- (1) Section 108 is amended by repealing paragraphs (ca) and (cb) and substituting the following paragraph:
 - (ca) authorising the Commission, in its discretion or on any grounds that are prescribed, to refund any part of a prescribed fee paid by a person in connection with an application under Part 5 for an authorisation or a clearance:
- (2) Section 108(cc) and (cd) are amended by inserting “or **65A**” after “application under section 58”.

Part 2

Other amendments and transitional provision

23 Consequential and minor amendments to principal Act

- (1) The principal Act is amended as set out in the **Schedule Schedule 1**.
- (2) By way of explanation—

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- (a) the amendments in **Part 1 of the Schedule Schedule 1** are consequential on the amendments made in **Part 1** of this Act; and
- (b) the amendments made in **Part 2 of the Schedule Schedule 1** adjust wording in sections that are otherwise not amended by this Act, in order to align the wording with that used in sections that are amended; and
- (c) the amendments made in **Part 3 of the Schedule Schedule 1** update references to the Trade Practices Act 1974, an Act of the Commonwealth of Australia, because the name of that Act is now the Competition and Consumer Act 2010; and
- (d) the amendments made in **Part 4 of Schedule 1** correct minor errors in the Act.

23A Amendments to Shipping Act 1987

- (1) This section amends the Shipping Act 1987.
- (2) In section 2, repeal the definitions of **direction** and **unfair practice**.
- (3) Repeal Parts 1 and 3.

23B Consequential amendment to principal Act as result of amendments to Shipping Act 1987

Section 44(2) and (3) of the principal Act are repealed.

~~**23C Transitional provision relating to amendments to Shipping Act 1987**~~

- (1) ~~At any time before **section 23A** of this Act comes into force, any carrier (as defined in section 2 of the Shipping Act 1987) who is a party to a contract, arrangement, or understanding, or to a proposed contract, arrangement, or understanding, may apply to the Commerce Commission for the following:~~
 - (a) ~~an authorisation under section 58 of the Commerce Act 1986, in which case the Commission may grant the authorisation in accordance with that section;~~
 - (b) ~~a clearance under **section 65A**, in which case the Commission may grant the clearance in accordance with that section, except that the clearance may be granted in respect of a contract, arrangement, or understanding that has already been entered into or arrived at (and not just in relation to proposed contracts, arrangements, or understandings).~~
- (2) ~~However, **subsection (1)** applies only to a contract, arrangement, or understanding so far as it contains a provision exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand, or from a place outside New Zealand to a place in New Zealand.~~
- (3) ~~To avoid doubt, a provision that relates to the carriage of goods to or from a ship, or to the loading or unloading of a ship, is not a provision of the sort described in **subsection (2)**.~~

- (4) This section is repealed at the close of the day immediately before **section 23A** comes into force.
- (5) Despite the repeal of this section, any application made pursuant to **subsection (1)** before its repeal may continue to be dealt with by the Commission as if the section had not been repealed.

24 Consequential amendment to District Courts Act 1947

Part 2 of Schedule 1A of the District Courts Act 1947 is amended by adding the following Part:

<i>Part N—Commerce Act 1986</i>	
Section	Offence
Section 82B	Offence relating to cartel provisions

25 Consequential amendment to Civil Aviation Act 1990

Section 91(1) of the Civil Aviation Act 1990 is amended by omitting “sections 27 to 29” and substituting “sections 27 to **30**”.

26 New Schedule 1AA inserted

Insert the **Schedule 1AA** set out in **Schedule 2** of this Act as the first schedule to appear after the last section of the principal Act.

Schedule 1

Consequential and minor amendments to principal Act

s 23

Part 1

Section 58

Subsection (5): repeal.

Subsection (6): repeal.

Section 59

Subsection (1)(a): omit “or section 29”.

Subsection (2)(a): repeal and substitute:

- (a) in the case of a contract to which section 27 applies, that the contract is subject to a condition that the provision does not come into force unless and until authorisation is granted to give effect to it and that an application must be made for that authorisation within 15 working days after the contract is entered into:

Section 61

Subsection (7): repeal.

Section 75(1)(a)

Add:

- (iv) proceedings for offences against **section 82B**:

Heading to section 85

Omit “Part 3” and substitute “section 47”.

Part 2

Section 80B(1)

Omit “body corporate” in each place where it appears and substitute in each case “person”.

Section 86(3)

Omit “in the case of a body corporate” and substitute “in any other case”.

Section 86B(2)

Omit “in the case of a body corporate” and substitute “in any other case”.

Section 87(3)

Omit “in the case of a body corporate” and substitute “in any other case”.

Section 87B(2)

Omit “in the case of a body corporate” and substitute “in any other case”.

Section 99A(3)

Omit “in the case of a body corporate” and substitute “in any other case”.

Part 3

Section 6A(b)

Omit “Trade Practices Act 1974” and substitute “Competition and Consumer Act 2010”.

Heading to section 6B

Omit “**Trade Practices Act 1974**” and substitute “**Competition and Consumer Act 2010**”.

Section 6B

Omit “Trade Practices Act 1974” and substitute “Competition and Consumer Act 2010”.

~~**Section 6C**~~

~~Omit “Trade Practices Act 1974” and substitute “Competition and Consumer Act 2010”.~~

Section 98H(2)

Omit “Trade Practices Act 1974” and substitute “Competition and Consumer Act 2010”.

Section 99A(1)

Omit “Trade Practices Act 1974” and substitute “Competition and Consumer Act 2010”.

Part 4

Section 2

Subsection (1): paragraph (c) of the definition of **acquire**: omit “lease” and substitute “lease.”.

Subsection (1): definition of **covenant**: omit “convenant” and substitute “covenant”.

Subsection (4): omit “Act” and substitute “Act.”.

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Schedule 1

Section 2—continued

Subsection (5): omit “Act” and substitute “Act.”.

Subsection (6): omit “In this Act” and substitute “In this Act.”.

Subsection (7)(c): omit “interconnected—” and substitute “interconnected,—”.

Subsection (8): omit “Act” and substitute “Act.”.

Section 3(1)

Omit “Act” and substitute “Act.”.

Section 37(2)

Omit “section a” and substitute “section, a”.

Section 42(1)(c)

Omit “section 37(3)(d) or (e)—” and substitute “ section 37(3)(d) or (e),—”.

Section 65(1)

In section 65(1)(c), omit “with—” and substitute “with,—”.

Section 81

Omit “following—” and substitute “following:”.

Section 82(1)

Omit “following—” and substitute “following:”.

Section 90(1)

Omit “servant” and substitute “servant.”.

Section 92

Omit “section 91—” and substitute “section 91:”.

Section 109

Omit “Act the” and substitute “Act, the”.

Schedule 2
New Schedule 1AA inserted

s 26

Schedule 1AA
Transitional, savings, and related provisions

s 6C

Part 1
Provisions relating to Commerce (Cartels and Other Matters)
Amendment Act 2011

1 **Interpretation**

- (1) In this Part, **Amendment Act 2011** means the Commerce (Cartels and Other Matters) Amendment Act 2011.
- (2) In this Part,—
 - (a) a reference to **section 30**, section 58A, **section 65A** or **section 80A** (or a provision of that section) is a reference to that section (or provision) as amended, inserted, or substituted by the Amendment Act 2011 (subject to **paragraph (b)**); and
 - (b) a reference to a former section (for example, former section 30) is a reference to that section as in force immediately before the commencement of this clause.

2 **Transitional provisions for cartel prohibition under section 30**

- (1) **Section 30(1)(a)** (which relates to entering into a contract or an arrangement, or arriving at an understanding, that contains a cartel provision) applies only to contracts, arrangements, or understandings that are entered into or arrived at after **section 30** comes into force.
- (2) **Section 30(1)(b)** (which relates to giving effect to a cartel provision in a contract, arrangement, or understanding) applies only to conduct occurring after **section 30** comes into force, but applies whether the contract, arrangement, or understanding is entered into or arrived at before or after **section 30** comes into force, and whether or not the contract, arrangement, or understanding has been suspended at any time.
- (3) **Subclauses (4) to (6)** apply to a contract, arrangement, or understanding that was entered into or arrived at before the commencement of **section 30** and that, at the time of that commencement, contained or may have contained a cartel provision.

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- (4) Despite **subclause (2)**, no proceedings under section 80, 80B, 80C, 81, or 82 may be commenced for a contravention of **section 30(1)(b) or 80A** occurring during the transitional period.
- (5) However,—
- (a) proceedings under former section 80 or 80C, or section 81 or 82, may be commenced in relation to conduct occurring during the transitional period as if former sections 30 to 33 were still in force during the transitional period; and
 - (b) proceedings under section 80B may be commenced for a contravention of former section 80A occurring during the transitional period.
- (6) Former sections 30 to 33, 80, 80A, and 80C continue to have effect as if those sections had not been repealed or amended by the Amendment Act **2011**, and section 89 continues to apply, for the purpose of—
- (a) investigating a contravention to which **subclause (5)** applies:
 - (b) commencing or completing proceedings to which **subclause (5)** applies:
 - (c) imposing a penalty or other remedy or making an order in proceedings to which **subclause (5)** applies.
- (7) In this section, **transitional period** means the 9-month period starting on the commencement of **section 30**.
- 3** **Transitional provision for authorisations under section 58**
Section 58A(1) and (2) applies to an authorisation that is given either before or after **section 9** of the Amendment Act **2011** comes into force.
- 4** **Transitional provision relating to amendments to Shipping Act 1987**
- (1) This clause applies to a contract, arrangement, or understanding, or to a proposed contract, arrangement, or understanding, in so far as it contains a provision to which the exception in section 44(2) applies.
- (2) At any time before **section 23A** of the Amendment Act **2011** comes into force, any carrier (as defined in section 2 of the Shipping Act 1987) who is a party to the contract, arrangement, or understanding may apply to the Commission for the following:
- (a) an authorisation under section 58, in which case the Commission may grant the authorisation in accordance with that section:
 - (b) a clearance under **section 65A**, in which case the Commission may grant the clearance in accordance with that section, except that the clearance may be granted in respect of a contract, arrangement, or understanding that has already been entered into or arrived at (and not just in relation to proposed contracts, arrangements, or understandings).

(3) This clause is repealed at the close of the day immediately before **section 23A** of the Amendment Act **2011** comes into force.

(4) Despite the repeal of this clause, any application made pursuant to **subclause (2)** before its repeal may continue to be dealt with by the Commission as if the clause had not been repealed.

5 Transitional provision for offences and contraventions under repealed or amended provisions

(1) This clause applies to an offence committed under, or a contravention of, any provision of this Act repealed or amended by the Amendment Act **2011** before the commencement of the provision that repealed or amended that provision.

(2) The provisions repealed or amended by the Amendment Act **2011** continue to have effect as if they had not been repealed or amended for the purpose of—

(a) investigating an offence or a contravention to which this clause applies:

(b) commencing or completing proceedings for an offence or a contravention to which this clause applies:

(c) imposing a penalty, or making an order, in relation to an offence or a contravention to which this clause applies.