Regulatory Impact Statement

Review of fees for clearance and authorisation applications under the Commerce Act 1986

Agency Disclosure Statement

1. The application fees for clearances and authorisations are being reviewed as these were set in 1990 and have not changed since. It is timely to review these fees while we are considering the fee level for the new collaborative activity clearance regime. The existing fees may now be too low given the increasing complexity of clearance and authorisation applications. In reviewing the fees, the options considered are constrained by the empowering fee-setting provision in section 108 of the Commerce Act, which only allows for a flat fee to be charged at the time of application.

2. Businesses may voluntarily apply to the Commerce Commission (the Commission) for clearance or authorisation of a commercial transaction. The number of applications in any year is related to business confidence and economic cycles. This work is demand-driven and non-discretionary for the Commission. This means it is difficult to estimate the Commission's costs of this work.

3. A key constraint in this analysis is that it is difficult to quantify the trend of the increasing complexity given that data on the costs of processing clearances and authorisations is also sensitive to other factors such as the workload of the Commission at the time. However, anecdotal evidence from the Commission has confirmed the increasing complexity of determining clearances and authorisation applications. We are also constrained in setting the application fee for the new regime in that we do not know how many applications the Commission will receive, and how much these will cost.

4. Any number of options for setting the application fees could be selected to reflect the wide spectrum of costs incurred by the Commission in processing clearances and authorisations. The options analysed in this paper reflect a best attempt to select meaningful options that are informed by the intention of the Act and previous reviews of the fees regime. Most of the options considered in this paper were approved by the Minister of Commerce for release for public consultation in May 2014.

5. The analysis of these options assumes that the clearance and authorisation regimes under the Commerce Act have significant private and public benefits and that the application fees should reflect these. It is difficult to estimate what proportion of overall benefits derived from the regimes is enjoyed by each party. Instead the options for setting the fees are assessed in light of the intention of the Act, Treasury's *Guidelines for Setting Charges in the Public Sector* and the Office of the Auditor General's *Good Practice Guide: Charging fees for public sector goods and services.*

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Status quo

Clearance and authorisation regimes under the Commerce Act 1986

6. Competition involves the process of rivalry between firms competing on the basis of price and quality to sell products to consumers. Competition benefits consumers by driving firms to lower costs, improve quality or develop better products.

7. New Zealand's generic competition law is set out in the Commerce Act 1986 (the Act) which is enforced by the Commerce Commission (the Commission), New Zealand's competition enforcement and regulatory agency. The Act applies to all sectors of the economy except those that are specifically exempt.

8. The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of New Zealand consumers. To help achieve this, the Act prohibits anti-competitive mergers or practices. The Act includes the following prohibitions:

   a. entities are prohibited from entering or giving effect to a contract or arrangement, or arriving at an understanding containing a provision that has the purpose, or has or is likely to have, the effect of substantially lessening competition in a market[1] (restrictive trade practices); and

   b. entities are prohibited from acquiring assets of a business or shares if the merger would have, or would be likely to have, the effect of substantially lessening competition in a market (mergers).

9. The Act allows entities proposing to embark on a potentially anti-competitive transaction to notify the Commission of the transaction through an application for a clearance or authorisation. A clearance or authorisation provides immunity against legal action by the Commission and private individuals.

Clearances

10. The merger clearance regime (under section 66) allows firms to test with the Commission whether a proposed merger ('business acquisition' under the Act) raises competition issues. The Commission may **clear** the merger if it will not have, or will not be likely to have, the effect of substantially lessening competition in a market. If the Commission is satisfied of this, the merger may be 'cleared' and the entity can continue without the threat of legal action.

Authorisations

11. Under the authorisation regime, the Commission may **authorise** an anti-competitive restrictive trade practice (section 58) or merger (section 67) if the transaction will, or will be likely to result in a public benefit that would outweigh any lessening of competition in a market.

12. In 2009, the Commission introduced a 'streamlined' authorisation process for applications it considers are straightforward, have obvious public benefits or minimal impacts on competition. This process is designed to enable the Commission to make a final determination as quickly as possible (within 40 days) while limiting the transaction costs to the applicants. Only one streamlined authorisation application has been received to date. Application fees for streamlined and standard authorisations are currently the same.

[1] For example: an agreement between firms to fix prices or carve up markets between them.

13. Officials have previously considered setting a lower application fee for streamlined authorisations to encourage entities to access the regime. However, the Commission indicated that this tiered fee arrangement would not be workable[2].

Benefits of the clearance and authorisation regimes:

14. The clearance and authorisation regimes under the Commerce Act have important benefits for the applicant, Commission, and wider public:

    a. **for the applicant**, the regimes provide certainty that they will not face legal action from the Commission or other private party as a result of undertaking the transaction. This certainty enables firms to undertake transactions that may have significant benefits to the applicant or wider public;

    b. **for the Commission**, the voluntary applications provide information on the state of competition in the relevant market as the potential for immunity incentivises applicants to cooperate fully. The voluntary regimes also reduce the burden of policing potentially anti-competitive transactions and undertaking ex-post enforcement (which can be more expensive than processing a clearance or authorisation and may not restore the state of competition to the market if the anti-competitive effect has already been felt); and

    c. **for the wider public**, the regimes facilitate pro-competitive, efficiency-enhancing activities by enabling firms to undertake transactions that may have direct public benefits. The Commission's written reasons on cases also provide a body of precedent that promotes certainty for other businesses on the application of the law.

New clearance regime for 'collaborative activities'

15. The Commerce (Cartels and Other Matters) Amendment Bill (Cartels Bill) introduces a new prohibition for cartels. Cartels exist when competitors agree to reduce or remove competition that exists or would otherwise exist between them. A cartel provision is an arrangement between competitors that has the purpose, effect, or likely effect of fixing prices, restricting output or allocating markets.

16. The Bill exempts 'collaborative activities' from the cartels prohibition as these are less likely to harm competition. Collaborative activities involve two or more people carrying on an enterprise, venture, or other activity in co-operation and not for the dominant purpose of substantially lessening competition in a market. For the exemption to apply, the cartels provision in question must be reasonably necessary for the collaborative activity to continue.

17. The Bill introduces a new clearance regime for collaborative activities. This allows entities to apply for clearance for a collaborative activity arrangement containing a cartel provision.

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[2] In some cases, the Commission may process an authorisation under the 'streamlined' process but later move it to the 'standard' process if the application is more complex than first thought. If the Commission had already collected the lower fee for the streamlined application it would be unable to then collect the higher fee for a standard authorisation as the fee must be charged and collected at the time of application.
The lower fee could also induce some firms to game the system by understating the complexity of their application in order to pay the lower streamlined fee. The Commission would then have to increase their caution in processing authorisation applications.

18. The Commission has indicated that this new clearance regime will follow a two stage process. First the Commission will assess whether the collaborative activities exemption applies to the arrangement; if it does the Commission will then consider whether the arrangement would substantially lessen competition in the relevant market.

Application fees regime for clearances and authorisations under the Commerce Act 1986

Existing application fees

19. Any entity applying for a clearance or authorisation must pay the prescribed fee upon application. The fees for clearance and authorisation applications are prescribed by regulations made under section 108(c) of the Commerce Act.

20. Because the application fee must be paid by the applicant at the time of application, only a flat fee can be charged by the Commission. The Commission cannot charge a fee on the basis of the complexity of an application or on the time taken to consider it, and cannot charge for full cost recovery.

21. The current application fees that must accompany an application are prescribed by the Commerce Act (Fees) Regulations 1990 (regulations):

Purpose of fee	Application fee (exclusive of GST)
For clearance of mergers (section 66)	$2,000
For authorisation of mergers (section 67)	$20,000
For authorisation of restrictive trade practices (section 58)	$10,000

22. An application fee has not yet been set for the new collaborative activities clearance regime introduced under the Cartels Bill. This fee will need to be set to ensure that the Commission is able to charge a fee for collaborative activities clearances once the Cartels Bill comes into force.

Application fees as a part of the overall cost of an application:

23. The cost of processing clearances and authorisations varies depending upon the complexity of the application. However, the application fee often represents a small proportion of the cost of most clearance and authorisation applications.

24. An entity is likely to engage the assistance of legal, economic or accounting experts in preparing an application. The cost of these experts is usually several magnitudes higher than the application fee. For example, one law firm estimates that the total legal costs associated with preparing, filing and supporting an application can range from around $50,000 for straight-forward applications to more than several hundred thousand for complex cases. Authorisation applications are typically at the higher end of this estimate.

25. For the Commission, the application fee usually only recovers a small proportion of the overall cost of processing clearance and authorisation determinations. The Government bears the vast majority of the Commission's assessment costs.

26. Data provided by the Commission on the average costs of clearances and authorisations processed between 1 July 2005 and 30 September 2014 reflects the small proportion of the cost that existing fees recover:

Purpose of fee	Average cost of processing applications (2005-2014)	Proportion of average cost recovered by fee
For clearance of mergers (section 66)	$131,730.96	**1.52%**
For authorisation of mergers (section 67)	$452,101.50	**4.42%**
For authorisation of restrictive trade practices (section 58)	$267,631.03	**3.74%**

27. Given that the applicant, Commission, and wider public all benefit from the use of the voluntary clearance and authorisation regimes, each should bear an appropriate proportion of the cost.

28. It is difficult to quantify the appropriate proportion that the fee should recover given the variation in the costs of applications and size of the associated benefit. However, given that each fee recovers less than 5% of the average cost of processing an application it is likely that existing fees are too low.

Issues with the existing fee structure

29. Existing application fees may need to be increased as they were set in 1990 and have not been updated since. The table above highlights that existing fees only recover a small proportion of the average costs of applications. In addition, the complexity of clearance and authorisation applications has increased since 1990. The application fee may now be too low and applicants may no longer contribute an appropriate proportion of the cost of an application.

30. It is difficult to quantify how much the complexity of applications has increased since 1990 due to a lack of data. However, this was confirmed in a 2008 baseline review of the Commission[3] which identified the increasing size and complexity of clearance and authorisation applications as a challenge to the Commission given the pressure these applications may place on funding. The baseline review attributed this to increasing concentration in some markets and an increasing tendency for applicants to contest decisions where a clearance or authorisation is declined.

31. The Commission's 2014 Statement of Intent also stated the complexity of competition issues raised in clearance and authorisation applications has increased in recent times, with many more involving global markets, and that this complexity is likely to continue to increase.

[3] Ministry of Economic Development: Commerce Commission Baseline Review. PricewaterhouseCoopers, 11 November 2008. http://www.med.govt.nz/business/competition-policy/pdf-docs-library/baseline-review-report.pdf

32. The fees were reviewed in 2005, and an increase in fees was recommended at the time. However, this increase was not implemented due to concern that the increase in fees may discourage some applicants. As a result, regulation-making powers were added to the Act to provide for:

    a. **refunding all or part of a prescribed fee where the costs of processing an application are lower than the application fee (section 108(cc)).** This addresses concerns that the increased fee level may result in some cases where the fee paid is greater than the cost of the application; and

    b. **prescribing a class of persons who are exempt from the requirement to pay any fee (section 108(cd))**. This addresses concerns that less resourced entities, specifically small and medium-sized enterprises (SMEs), may be discouraged from applying for a clearance or authorisation if fees are increased.

33. Regulations have not yet been made for either of these purposes. However, if application fees are to increase then these regulations could be developed to mitigate any deterrent effect.

MBIE released a discussion document in May 2014

34. On 7 May 2014, officials released a discussion document considering the issues with the existing fees regime noted above. Three submissions were received from Business New Zealand, Bell Gully and Simpson Grierson. These stated that there was generally little appetite for an increase in fees, but that any increase should be limited.

35. Submitters broadly agreed that the application fee for the new collaborative activity clearance regime should be set at the same level as the application fee for a merger clearance.

36. The discussion document also considered whether any price-sensitive class of applicant should be exempt from paying clearance and authorisation fees, should they increase. Submissions were divided on this issue.

Problem definition

37. There are two main issues with the existing application fees regime that are considered in this paper:

ISSUE 1: The existing fees need to be adjusted

38. Applicants benefit from the voluntary regimes by gaining certainty that they can proceed with a merger or practice without fear of legal action from the Commission or private party. The applicant should shoulder an appropriate proportion of the cost of the application to reflect this benefit. Currently application fees recover less than 5% of the average costs for clearances and authorisations. It is likely that applicants are not meeting an appropriate proportion of the cost given the benefits they receive from the regimes.

39. The existing application fees have remained unchanged since they were set in 1990. The complexity and cost involved in processing many applications has increased since 1990 and fees should be updated to realign the costs and benefits borne by the different parties. It is difficult to quantify this increasing complexity due to a lack of data since 1990; however the increasing complexity of applications was noted in a 2008 baseline review of the Commission and more recently in the Commission's 2014 Statement of Intent. The Commission has noted in the 2014 Statement of Intent that the increasing complexity of applications has made it more challenging for the Commission to issue a determination within the statutory timeframes.

40. Most of the cost of processing clearance and authorisation applications is met from within the Commission's Enforcement of General Market Regulation appropriation. If application fees are not increased to reflect the increasing complexity of applications, the Commission will have to bear the increasing costs of processing more complex clearances and authorisations from within this appropriation. This could result in other activities funded under this appropriation, such as advocacy or enforcement, being crowded out or scaled back.

41. If fees are to increase, there are two further considerations to address to mitigate any deterrent effect of increasing fees. Regulations may be made to prescribe:

    a. **a refund mechanism:** regulations may be made to require the Commission to give a refund where the application fee is greater than the cost of processing the application. The chance of the Commission over-recovering through fees would increase if fees are increased; and

    b. **an exemption for price-sensitive entities:** if fees are increased some classes of applicants may require an exemption from the requirement to pay any fees. Some less resourced entities may be more price-sensitive to an increase (e.g. SMEs) and could be discouraged from applying for a clearance or authorisation.

ISSUE 2: Fees need to be set for the new collaborative activities clearance regime

42. An application fee must be set for the new clearance regime for collaborative activities introduced under the Cartels Bill. As the Cartels Bill has redefined the cartel prohibition/offence and exemptions, the Commission may receive a comparatively high level of applications until a sufficient body of precedent has developed. If a fee is not set, the Commission would have to process these applications free of charge, which could put pressure on the Commissions' baselines.

Objectives

43. It is difficult to accurately estimate what proportion of benefit derived from the regimes is enjoyed by each party given the differences in the costs of applications. Instead, the options for setting the fees are assessed against four objectives in light of the intention of the Act and guidance on the setting of fees, including: The Treasury's *Guidelines for Setting Charges in the Public Sector* and Office of the Auditor General's (OAG) *Good Practice Guide: Charging fees for public sector goods and services.*

Does the regime reflect the split of costs and benefits between the applicant, the Commission and the wider public?

44. Given that the Commission and wider public also significantly benefit from the clearance and authorisation regimes, the Commission should shoulder the majority of the cost of processing most applications. However, clearances and authorisations also benefit applicants by providing certainty that they can undertake a merger or practice without fear of legal action from the Commission or third party. Applicants should bear an appropriate proportion of the cost of processing the applications to reflect this benefit. This is in line with Treasury guidance, which states that the setting of fees should deal equitably with those who benefit from the service.

Does the regime encourage applications or discourage evasion?

45. The intention of the Act is that voluntary clearance and authorisation regimes are accessible for entities so that the public benefits of the regimes can be realised. It is important that the fees regime reflects this intention of the Act. If fees are set too high, or the full cost of the application recovered, then firms may be deterred from seeking a clearance or authorisation and the benefits of the regimes would not be realised. It may also be argued on equity grounds that the collaborative activity clearance should be accessible for all businesses given the consequences of not applying and making an incorrect self-assessment include incarceration of individuals.

46. OAG guidance states that application fees should not be set at such a level that causes over-recovery, and Treasury guidance also notes that it is important fees are set at a level that minimises evasion. If the fee is set too high entities may evade the regime or refrain from pursuing the transaction altogether:

    a. Entities may pursue the activity and risk legal action from the Commission or third party. The Commission will then have to investigate the anti-competitive conduct and enforce the prohibitions. Enforcement action is expensive and may be unable to undo the anti-competitive effect if the conduct has already been undertaken; or

    b. Entities may refrain from pursuing the activity due to uncertainty about whether or not it would be prohibited. This could be counterproductive to the private entity and the public if the activity did not raise competition concerns, or if the public benefits to the public outweighed any potential anti-competitive effect.

Is the application fee set at a level that does not encourage frivolous applications or result in ineffective use of public funding?

47. Treasury guidance states that fees should be set at a level that encourages decisions on the services demanded that are consistent with the efficient allocation of resources. If the fee is set too low, it may encourage applications that have minimal competition impact and entities may use the regimes to as a cheap alternative to obtaining good legal advice on the competition impacts of a proposed merger or practice. Given that the Government shoulders the majority of the cost of processing clearances and authorisations this would not be an effective use of public funding and would divert resources away from where they may be needed.

Is the regime able to be implemented and administered effectively and efficiently?

48. A clearly defined fee to be paid at the time of application has clear advantages for the Commission and applicants. These include:

    a. minimising the administrative burden of calculating the appropriate charge;

    b. precluding debate on the particular fee to be charged under each regime; and

    c. providing certainty for the applicant of the costs of an application.

Options and impact analysis

ISSUE 1: The existing fees need to be adjusted

49. Any number of options for setting the application fees could be selected to reflect the wide spectrum of costs incurred by the Commission in processing clearances and authorisations. Seven options have been selected for analysis in this paper:

	Fees (excl. GST)						
Purpose of fee	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6	Option 7
For clearance for mergers (section 66)	$2,000	$3,280	$5,000	$5,000	$7,000	$8,600	$31,000
For authorisation for mergers(section 67)	$20,000	$32,800	$25,000	$32,000	$30,000	$36,000	$178,000
For authorisation for restrictive trade practices (section 58)	$10,000	$16,400	$25,000	$32,000	$30,000	$36,000	$71,000

50. These options are directly informed by the public consultation process. Options 1, 5, 6 and 7 were released for public consultation in the discussion document on the fees review that was released in May 2014. Options 2 and 3 are based on specific feedback from submitters on the discussion document. Option 4 is a hybrid of Options 2 and 3.

Option 1: Retain the status quo

51. This option proposes no change to the existing application fees for clearance and authorisation applications.

Option 2: Increase the existing fees for inflation

52. This option simply updates the existing application fees for merger clearances and authorisation for inflation. It adds a 2.2% compound average annual rate of inflation to reflect the impact of inflation since 1990. Several submitters proposed this as their preferred option for updating the fees.

Option 3: Increase fees in line with Simpson Grierson's proposed capped fee levels

53. In its submission on the discussion document, Simpson Grierson considered that, if fees are to increase, that the fee increases be capped at $5,000 for a clearance and $25,000 for an authorisation. Simpson Grierson argues that these fee levels would allow the Commission to recover a greater percentage of its costs while not discouraging applications.

Option 4: Increase fees with inflation and realign fees for similar applications

54. This option is a mix of options 2 and 3. It updates the existing application fees for the impact of inflation since 1990, but rounds down to $32,000 to allow for simpler GST calculation. In addition it realigns the fees so that the same fees are set for similar types of transactions.

Option 5: Increase the fees according to 2005 Cabinet decision

55. This option proposes to increase the fees on the basis of the levels approved by Cabinet in 2005[4].

Option 6: Increase fees according to 2005 Cabinet decisions plus inflation (MBIE Preferred Option)

56. This option uses the proposed fees from Option 5 but adds a 2.2% compound average annual rate of inflation to account for the time that has passed since the fees set out in Option 5 were approved in 2005.

Option 7: Increase fees based on the median costs to the Commission

57. This option is based on recovering the median costs to the Commission of assessing clearance and authorisation applications. This includes the direct costs from assessing an application for clearance or authorisation exclusive of overheads. The fee levels under this option are significantly higher than current fee levels, reflecting the large proportion of the cost that is currently met by the Government.

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[4] The fees agreed to in 2005 were the result of a 2004 review of the fees regime. A discussion document was released in November 2004 which invited views on potential ranges for the proposed fees levels. These ranges were informed by the range of costs incurred by the Commission in processing clearances and authorisations. The fee levels agreed to by Cabinet were roughly midpoints of these indicative ranges. Submissions received on the 2004 discussion document broadly agreed that some increase in the level of fees was valid but radical adjustments were not.

ISSUE 1: Analysis of Options

	Does the regime reflect the split of costs and benefits between the applicant, the Commission and the wider public?	Does the regime encourage applications or discourage evasion?	Does the regime discourage frivolous applications or prevent ineffective use of public funding?	Is the regime able to be implemented and administered effectively and efficiently?
Option 1: Retain the status quo	No. The status quo no longer reflects the split of benefits between the applicant and Commission given that the complexity of clearance and authorisation applications has increased since 1990. It is likely that applicants are now paying a smaller proportion of the overall cost of applications.	Yes. At the current level, application fees are unlikely to deter applications or encourage evasion as the fee is often a small proportion of the overall cost of an application.	Unclear. Given that the level of the fee is a small proportion of the overall cost of the application, some entities may be encouraged to use the regime even where the competition impacts of the application are minimal. This conduct would result in an inefficient use of public funding.	Yes. The existing fees are flat fees (so preclude debate on the amount to be charged) and are well-known to potential applicants given that they have remained unchanged since 1990.
Option 2: Increase the existing fees for inflation	No. This option only reflects the change of the fee in real terms due to inflation since 1990.	Yes. The proposed increase is still conservative enough to not deter entities from applying. The fee level will still be a small proportion of the overall cost of most applications.	Unclear. The compound interest adjustment means that the merger clearance fee may be too low which may encourage some entities to use the regime even where the competition impacts of the application are minimal.	Yes. The proposed flat fees would be unlikely to impose any additional administrative complexity.
Option 3: Increase fees in line with Simpson Grierson's proposed capped fee levels	No. Although the increase to clearance fees would see the Commission recover a more appropriate proportion of the cost, the adjustment to the authorisation fees are likely to be insufficient as they are below the inflation-adjusted level.	Yes. The proposed increase in fees is conservative enough to not deter entities from applying. The fee level will still be a small proportion of the overall cost of most applications.	Yes. Increasing fees to this level would decrease the likelihood that entities will use the regimes to gain advice on applications with minimal competition impacts.	Yes. The proposed flat fees would be unlikely to impose any additional administrative complexity.
Option 4: Increase existing fees for inflation and realign for similar applications	Unclear. The adjustment for inflation and realignment ensures that fees reflect changes in costs of applications since 1990. The increased clearance fee better reflects the benefits to applicants and increasing complexity of many applications. The authorisation fees are still only adjusted in real terms.	Yes. The proposed increase is still conservative enough to not deter entities from applying. The fee level will still be a small proportion of the overall cost of most applications.	Yes. Increasing fees to this level would decrease the likelihood that entities will use the regimes to gain advice on applications with minimal competition impacts.	Yes. The proposed flat fees would be unlikely to impose any additional administrative complexity.

Option 5: Increase the fees according to 2005 Cabinet decision	Unclear. Although the fee level proposed under this option better reflects the appropriate proportion of costs to be shouldered by the applicant, the proposed levels may now be outdated given that these levels were proposed nine years ago. In addition, the proposed authorisation fees are likely to be insufficient as they are slightly below the inflation-adjusted level.	Yes. The proposed increase in fees is conservative enough to not deter entities from applying. The fee level will still be a small proportion of the overall cost of most applications.	Yes. Increasing fees to this level would decrease the likelihood that entities will use the regimes to gain advice on applications with minimal competition impacts.	Yes. The proposed increase in the flat fees will not impose any additional administrative complexity. Also, aligning the fees for merger and restrictive trade practice authorisations may improve administrative simplicity.
Option 6: Increase fees according to 2005 Cabinet decisions plus inflation (**MBIE Preferred Option**)	Yes. The increase in the fee better reflects the benefits to applicants and the increasing complexity of many applications. The adjustment for inflation also ensures that the fee reflects the real change in the fee since the 2005 review.	Yes. The proposed increase is still conservative enough to not deter entities from applying. The fee level will still be a small proportion of the overall cost of most applications.	Yes. Increasing fees to this level would decrease the likelihood that entities will use the regimes to gain advice on applications with minimal competition impacts.	Yes. The proposed flat fees would be unlikely to impose any additional administrative complexity.
Option 7: Increase fees based on the median costs to Commission	No. Under this option the cost to the applicant far outweighs the benefit received and does not reflect the benefits to the Commission and public of encouraging entities to use the voluntary regime.	No. The significant increase in fees is likely to deter many applications. This would not support the intention of the Act to provide accessible voluntary clearance and authorisation regimes.	Yes, however the significant increase in fees is also likely to discourage applications with merit.	No. The significant increase in fees would likely deter many entities from applying. The Commission would have to invest more in policing potential anti-competitive conduct. This is more expensive and administratively complex than considering clearance and authorisation application.

58. It is likely that existing fees, considered under Option 1 are too low given the increasing complexity of clearance and authorisation applications. It is likely that at these levels, applicants are not meeting an appropriate proportion of the cost of an application.

59. Conversely, Option 7 sets the application fees at a level that is far too high. Under this option, the cost of the fee would far outweigh the benefit the applicant receives from using the regime. It is also likely that these fee levels would deter entities from applying. The high risk of evasion means that the Commission would have to invest in policing potentially anti-competitive transactions. This is more expensive than processing clearance and authorisation applications.

60. Updating the existing fees for inflation, under Option 2, only reflects the changes to the fees in real terms and does not account for the increasing complexity of applications or reflect the fact that applicants should bear an appropriate proportion of the cost of an application.

61. Option 3 increases the clearance fee above the level of inflation to $5,000. This increase better reflects the increasing complexity of applications and appropriate split of costs and benefits than Option 2. However, setting the fees for authorisations at $25,000 may be an insufficient increase compared to Option 2 as these fee levels are below the inflation-adjusted levels and would be unlikely to reflect the increasing complexity of applications or the appropriate split of costs and benefits between the applicant and Commission.

62. Given that Option 2 sets the clearance fee too low, and Option 3 sets the authorisation fee too low, it may be appropriate to select a mix of fees from these options. Option 4 is a feasible option.

63. The increases proposed under Option 5 were considered appropriate increases to the application fees in 2005. However, the proposed fee levels under this option are now nine years old and should be updated to reflect the real change in these fee levels since 2005.

64. Option 6 reflects the real change in the fee levels agreed to by Cabinet in 2005. **On balance, MBIE prefers Option 6 over Option 4, but the difference is minor**. The fee levels under option 6 better reflect the increasing complexity of clearance and authorisation applications, and ensure that applicants meet an appropriate proportion of the cost of an application given the benefit they receive from accessing the regime.

65. Fees for merger and restrictive trade practices authorisations are aligned to reflect the fact that the Commission undertakes similar processes, and incurs similar costs, in processing merger and restrictive trade practices authorisations. Submissions broadly agreed that the fees for merger and restrictive trade practice authorisations be the same as they involve similar processes.

66. The preferred fee levels conservatively increase the proportion of the cost met by the applicant:

Purpose of fee	Average cost of processing applications (2005-2014)	Proportion of average cost recovered by existing fee	Proportion of average cost recovered by proposed fees (Option 6)
Clearance of mergers (section 66)	$131,730.96	1.52%	**6.53%**
Authorisation of mergers (section 67)	$452,101.50	4.42%	**7.96%**
Authorisation of restrictive trade practices (section 58)	$267,631.03	3.74%	**13.45%**

67. Even with the preferred increases, the fee levels are still conservative enough to minimise evasion. The Government will continue to shoulder the majority of the cost for most clearances and authorisations. However, the increased application fees will reduce pressure on the Commission's appropriations from having to meet the costs of increasingly complex applications.

68. Submissions received on the discussion document released in May 2014 broadly stated that any increase in fees should be limited and that the Government should continue to bear the majority of the costs of applications given the significant benefits the Commission and wider public gain from entities using the voluntary regimes. Option 6 is consistent with this feedback as it sets a conservative increase to the application fees.

69. Although officials prefer increasing the application fees in line with Option 6, we recognise that there are a range of factors to consider in setting the fee levels, and that there is a wide range of possible options for setting the fees. Other fee levels could be explored, or a mix of appropriate options analysed in this paper could be developed.

70. *Recommendation: There is a range of possible levels at which fees may be set. On balance, MBIE officials prefer setting the application fees in line with the levels agreed to by Cabinet in 2005 plus inflation.*

Other matters to consider should application fees increase:

71. Given the proposed increase in application fees, regulations should also be considered to address two separate issues that may arise from the increase in fees:

    a. SMEs could be discouraged from applying by the higher fees; and

    b. the increase in fees may lead to over-recovery where the cost of the fee outweighs the cost of the application.

Potential exemption for SMEs:

72. Regulations may be made to exempt a class of applicant from the requirement to pay any fee. An exemption might be justified where significant public benefit could be derived from a cleared or authorised merger or practice that might otherwise not take place if the applicants were deterred from applying due to the requirement to pay the fee. SMEs could be 'price sensitive' to an increase in application fees as it is possible that the less resourced an entity is, the more heavily the fee may weigh in the decision to apply for clearance or authorisation.

73. This section of the RIS considers whether SMEs should be exempt from the requirement to pay any fees. The options analysed are:

    a. Option 1: Exempt 'SMEs' from the requirement to pay any application fee; or

    b. Option 2: Do not exempt 'SMEs' from the requirement to pay any application fee (**Preferred Option**).

74. These options are analysed in the table below:

	Does the regime reflect the split of costs and benefits between the applicant, the Commission and the wider public?	Does the regime encourage applications or discourage evasion?	Does the regime discourage frivolous applications or prevent ineffective use of public funding?	Is the regime able to be implemented and administered effectively and efficiently?
Option 1: Exempt 'SMEs' from requirement to pay application fee	No. The size of the entity often bears little relationship to the costs or complexity involved in processing a clearance or authorisation application. Therefore SMEs should bear the same proportion of costs as a larger entity.	Yes. Some SMEs may be more likely to apply if they did not have to pay the fee. However, for most SMEs the fee will not weigh heavily in deciding whether to apply given that the other costs associated with applying may be substantial.	No. An exemption from the requirement to pay a fee may encourage some SMEs to access the regimes to gain legal advice on applications with minimal impacts on competition.	Unclear. An exemption may add some administrative burden. A definition for 'SMEs' will have to be developed and the Commission will have to consider each applicant against this to determine if the exemption might apply. Although the administrative costs may be minimal, it adds another consideration to the process.
Option 2: Do not exempt 'SMEs' from the requirement to pay application fee (**Preferred option**)	Yes. The size of the entity often bears little relationship to the cost and complexity of an application. An application from an SME may cost a similar amount to an application from a larger firm so SMEs should also bear an appropriate proportion of the cost.	Yes. Although some entities may be more likely to apply if they did not have to pay the fee, it is unlikely that many SMEs would be deterred from applying due to the requirement to pay the fee as the fee is often a minor proportion of the overall cost of an application.	Yes. Requiring the payment of a fee reduces the likelihood that some SMEs may access the regimes to gain legal advice on applications with minimal impacts on competition.	Yes. Avoids the extra administrative cost of deciding when an exemption might apply to an applicant. This would require the Commission to assess the entity against certain factors relating to a prescribed definition of SME.

75. Officials recommend that SMEs not be exempt from the requirement to pay a fee. It is possible that some SMEs may be more likely to apply for a clearance or authorisation if they were not required to pay the application fee. However, most SMEs seeking a clearance or authorisation will incur substantial costs from seeking legal and economic advice that will outweigh the cost of the application fee (even with the increased fee levels proposed above). The application fee will not impact their decision of whether or not to apply so an exemption from the requirement to pay the fee would have little impact on encouraging meritorious applications from SMEs.

76. Another reason for not exempting SMEs from the requirement to pay the application fees is that some SMEs may make frivolous applications to access 'free' legal advice on a proposed merger or transaction. Such frivolous applications are an ineffective use of public funding.

77. A third reason for not exempting SMEs is that applications from SMEs often result in costs similar to those incurred in processing an application from a larger firm, so they should bear an appropriate proportion of the costs. The Commission has indicated that the size of the entity often bears little relationship to the potential impact on competition within a market or the complexity of issues raised by the application. The costs involved in processing a clearance or authorisation application from an SME may be comparable to the costs involved in processing an application from a larger firm.

78. *Recommendation: Do not exempt SMEs from the requirement to pay the application fee.*

Refund mechanism for over-recovery:

79. The OAG's *Good Practice Guide: Charging fees for public sector goods and services* states that fees should not exceed the cost of providing a service.

80. In some cases, the application fee for a clearance or authorisation could be greater than the cost of processing the application itself. The potential for over-recovery is greater if fees increase. To prevent this, regulations may be made under section 108(cc) of the Act to require the Commission to refund all or part of the application fee where the amount of the fee is greater than the cost of processing an application.

81. This section of the paper considers whether a refund mechanism may be necessary given the proposed increase in application fees. The options analysed are as follows:

    a. Option 1: Develop regulations to require the Commission to refund all or part of the application fee where the cost of the application is less than the application fee paid (**Preferred Option**); or

    b. Option 2: Do not develop regulations to require the Commission to refund all or part of the application fee where the cost of the application is less than the application fee paid.

82. These options are analysed in the table below:

	Does the regime reflect the split of costs and benefits between the applicant, the Commission and the wider public?	Does the regime encourage applications or discourage evasion?	Does the regime discourage frivolous applications or prevent ineffective use of public funding?	Is the regime able to be implemented and administered effectively and efficiently?
Option 1: Develop regulations to set a refund mechanism **(Preferred Option)**	Yes. The refund mechanism would allow for applicants to be refunded where the fee they have paid outweighs the cost of their application. This ensures they are not funding a disproportionate level of the cost of an application given the benefit they receive.	Yes. Although the chances of the application fee being greater than the cost of an application are low, some applicants may be further encouraged to apply for clearance or authorisation by the prospect of a refund (especially if the application is straightforward or more likely to result in a low cost).	N/A.	Yes. The Commission has indicated that it could implement the fees refund mechanism without making substantial administrative changes to its current systems and processes. It is also likely that fees refunds would be rare given that the fee is a small proportion of the overall cost of most applications.
Do not develop regulations to set a refund mechanism	No. Without a refund mechanism some applicants may pay more than the cost of their application. In this case the applicant will be paying much more than the appropriate amount given the benefit they receive.	Yes. Even without a refund most applicants would not be discouraged from applying. The chances of the fee being greater than the cost of the application are low.	N/A.	Yes. The Commission would not be required to process any refunds.

83. Officials recommend developing regulations under section 108(cc) to require the Commission to provide a refund to the applicant where the cost of the application is less than the prescribed fee.

84. The primary reason for introducing the refund mechanism is that it supports the intention of the fees regime to ensure that applicants meet only an appropriate proportion of the cost of an application. Although the fees regime is not based on cost recovery, if the applicant pays more than the total cost of the application they are clearly paying an inappropriately high amount relative to the benefit they receive from the clearance or authorisation. This proposal is in line with OAG guidance which states that fees should not exceed the cost of providing a service.

85. Introducing the refund mechanism is unlikely to impose an administrative burden on the Commission. The Commission has indicated that its current finance systems and administrative settings are more than capable of handling this, so it would not have to change its existing systems. The Commission would construct a report which approximates the allocation of staff and overheads to the individual application to calculate the cost of the application. If a refund was necessary, the Commission would issue a credit note and refund the sum owing once the application was completed and the costs finalised.

86. Processing the refunds could impose some administrative costs on the Commission. However these costs are likely to be minimal. Overpayment by applicants is rare as the existing fees are very low relative to the cost of processing most applications[5]. Even with the proposed increases in fees the chance of over-recovery by the Commission will be small, so refunds are expected to be uncommon.

87. *Recommendation: Develop regulations to require the Commission to refund all or part of the application fee where the cost of determining an application is less than the application fee paid.*

[5] Data from the Commission indicates that between 1 July 2005 and 30 September 2014 just one merger clearance and one RTP authorisation have cost less than the application fee paid.

ISSUE 2: Fees need to be set for the new collaborative activities clearance regime:

88. The Commission has issued draft *Competitor Collaboration Guidelines* to outline how it intends to administer this new regime. Unlike the existing merger clearance regime, the new collaborative activities clearance regime will be processed in two stages:

    a. First the Commission will assess whether the collaborative activities exemption applies to the arrangement (that the arrangement is a 'collaborative activity', and that the cartels provision is reasonably necessary for the purpose of the collaborative activity);

    b. If the exemption applies, the Commission will then consider whether the arrangement would, or would be likely to substantially lessen competition in the market. This second stage of the assessment process is broadly consistent with the existing merger clearance process which also considers whether the arrangement would, or would be likely to substantially lessen competition in the market.

89. Although the structure of the collaborative activities clearance regime is different to the merger clearance regime, the Commission has indicated that both regimes will incur similar costs. The first stage of determining whether the exemption is likely to apply will add negligible cost to the clearance process.

90. Given that the Cartels Bill introduces new criminal sanctions for cartel conduct, there is an argument that the fee level for the new collaborative activities clearance regime should be set at a lower level to ensure that the new clearance regime is accessible to potential applicants.

91. Proposed options for setting the fee for the new clearance regime are as follows:

    a. Option 1: Set no application fee for collaborative activities clearance regime (status quo); or

    b. Option 2: Set the fee equal to the application fee for a merger clearance (Preferred Option); or

    c. Option 3: Set the fee lower than the application fee for the merger clearance to improve access to the regime.

92. Option 1, not setting an application fee for the new regime, is analysed for illustrative purposes only. A fee *will* need to be set for the new clearance regime. If not set, the Commission will have to process applications free of charge which could put pressure on the Commission's funding appropriation.

ISSUE 2: Analysis of Options

	Does the regime reflect the split of costs and benefits between the applicant, the Commission and the wider public?	Does the regime encourage applications or discourage evasion?	Does the regime discourage frivolous applications or prevent ineffective use of public funding?	Is the regime able to be implemented and administered effectively and efficiently?
Option 1: No fee set (status quo)	No. Applications would be processed free of charge by the Commission. Applicants would not meet any of the cost involved with processing an application.	Yes. Applicants would be encouraged to apply if no fee was collected on application.	No. If no fee was payable on application then the Commission could receive many frivolous applications from entities seeking free legal advice.	Unclear. The Commission would not have to collect an application fee, but the large amount of frivolous applications may soak up the Commission's resources.
Option 2: Set fee at the same level as the merger clearance fee (**Preferred option**)	Yes. This option reflects the fact that the new clearance regime is likely to result in similar costs to the Commission as a merger clearance.	Yes. Assuming that the fees are set at a level that is conservative enough to not deter entities from applying for a clearance or authorisation.	Yes. Assuming that the fee levels are increased above the status quo.	Yes. Setting the new clearance fee at the same level as the merger clearance fee is slightly more straightforward administratively than Option 3.
Option 3: Set the fee at a lower level than the application fee for the merger clearance	No. Setting a lower fee for the new regime ignores the fact that the collaborative activities clearance regime is likely to result in similar costs to the Commission as a merger clearance.	Yes Assuming that the fees are set at a level that is conservative enough to not deter entities from applying for a clearance or authorisation. A lower fee will be even more likely to encourage applications.	Unclear. The chance of the Commission receiving frivolous applications will increase if fees are set at lower levels. However the result of this will depend on the level at which the fee is set.	Yes. However this option would have a small impact in that the application fees for collaborative activities clearance is different to the fee for a merger clearance.

93. Officials recommend setting the application fee for the new collaborative activities clearance regime at the same level as the fee for merger clearance applications. Based on officials' preferred option for setting the merger clearance fee the fee would be set at $8,600 for each clearance regime.

94. Aligning these fees reflects the fact that both regimes are likely to result in similar costs to the Commission, despite the new regime being based on a 'two stage' process. At the preferred fee levels, it is likely that the fee will represent a small amount of the cost of an application. If the fees are set at the preferred level (or at a level that is not prohibitively high), it is unlikely that applicants would be deterred from applying for a clearance, so it would be unnecessary to prescribe a lower fee to improve accessibility to the regime.

95. *Recommendation: Set the fee for the collaborative activity clearance at the same level as the fee for merger clearance*

Consultation

96. The Commerce Commission has been consulted on the issues analysed in this paper. A public discussion document was also released in May 2014. Three submissions were received from Bell Gully, Simpson Grierson and Business New Zealand. These submissions have informed the analysis of options in this paper.

Conclusions and recommendations

97. On balance, MBIE officials prefer increasing the application fees in line with the fee levels approved by Cabinet in 2005 adjusted for inflation. The fee for a merger clearance would be increased to $8,600 and the fee for authorisations increased to $36,000. These fee levels will increase the proportion of the cost borne by the applicant in line with the benefits they receive from the regime, and reflect the increasing cost and complexity of clearance and authorisation applications since existing fees were set in 1990. However, officials recognise that there is a range of factors to consider in setting the fees and that other fee levels, or a mix of the fee levels discussed in this paper, may be considered.

98. Even with the preferred fee increases, the application fee will still be a small proportion of the cost of processing most clearances and authorisations. However, increasing the application fees increases the chance of over-recovery where the amount of the fee is greater than the cost of processing an application. We recommend prescribing a refund mechanism to require the Commission to refund all or part of the application fee where the application fee paid is greater than the cost of processing the application.

99. We recommend setting the application fee for the collaborative activities clearance regime at the same level as the fee for merger clearances. This reflects the fact that the Commission has indicated that both regimes are likely to result in similar costs. Also, it is likely that at the preferred fee levels the application fee will still be a small proportion of the cost of an application under the new regime, so it would not be necessary to set a lower fee to improve accessibility to the new regime. Even if a fee level is selected that is different to the preferred option in this paper, officials still recommend aligning the fees for merger and collaborative activities clearances based on these reasons.

100. We do not recommend exempting small and medium-sized enterprises (SMEs) from the requirement to pay fees. It is unlikely that SMEs would be deterred from applying for a clearance or authorisation by the requirement to pay a fee given that the fee represents only a small proportion of the overall cost of a clearance or authorisation application. Also, clearance and authorisation applications from SMEs often cost a similar amount to applications from larger firms, so SMEs should bear a proportion of this cost.

Implementation plan

101. The Commerce Act (Fees) Regulations 1990 will need to be amended to implement the proposals in this paper, including:

    a. increasing the prescribed application fees for clearance and authorisation applications;

    b. setting the application fee for the new collaborative activities clearance regime; and

    c. prescribing a refund mechanism to prevent over-recovery.

102. These regulations should be completed before the enactment of the Commerce (Cartels and Other Matters) Amendment Bill. This will enable the Commission to charge an application fee for the new collaborative activities clearance regime when this regime comes into force. If the fee is not set at the time the new regime comes into force, the Commission may have to process applications free of charge.

Monitoring, evaluation and review

103. Monitoring of the impact of the changes to the fees regime will be undertaken through the normal monitoring of the Commerce Act.