MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

COVERSHEET

Minister	Hon Dr David Clark	**Portfolio**	Commerce and Consumer Affairs
Title of Cabinet paper	Commerce Amendment Bill: Approval for Introduction	**Date to be published**	12 April 2021

List of documents that have been proactively released		
Date	**Title**	**Author**
	Commerce Amendment Bill: Approval for Introduction	Office of the Minister of Commerce and Consumer Affairs
	Cabinet Legislation Committee Minute of Decision: Commerce Amendment Bill: Approval for Introduction	Cabinet Office

Information redacted **YES / ~~NO~~**

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Some information has been withheld in accordance with constitutional conventions and because the making available of that information would be likely to prejudice the international relations of the Government of New Zealand.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Legislation Committee

Commerce Amendment Bill: Approval for Introduction

Proposal

1 This paper seeks approval to introduce the Commerce Amendment Bill (**the Bill**) (attached) to the House.

Policy

2 The Bill will implement Cabinet's decisions [CAB-20-MIN-0031 and DEV-20-MIN-0007 refer] to amend the Commerce Act 1986 (**the Act**) to:

- 2.1 strengthen the Act's section 36 prohibition against the misuse of market power (**the section 36 prohibition**);
- 2.2 empower the Commerce Commission (**the Commission**) to authorise conduct that may contravene the section 36 prohibition but which is in the public interest;
- 2.3 repeal the safe harbours for intellectual property; and
- 2.4 make a number of technical changes to improve the functioning of competition law, including to:
  - 2.4.1 align the treatment of cartel provisions in covenants with those in contracts;
  - 2.4.2 clarify that the Act applies to interests in land;
  - 2.4.3 increase the penalties for anti-competitive business acquisitions to align with the penalties for other forms of anti-competitive conduct;
  - 2.4.4 increase the maximum number of Commission members from six to eight; and
  - 2.4.5 provide the Commission with information sharing powers.

Strengthening the section 36 prohibition against the misuse of market power

3 Section 36 of the Act currently prohibits firms with substantial market power from taking advantage of that power for an anti-competitive purpose. The Bill replaces this provision to provide that firms with substantial market power are prohibited from engaging in conduct that has the purpose, effect or likely effect, of substantially lessening competition in a market.

4 By better targeting the prohibition directly at the anti-competitive impact of a firm's conduct in the market, this change is expected to reduce the cost and complexity of enforcement, improve the deterrent value of the prohibition and increase certainty for firms in their ordinary business conduct. It will also align section 36 with the equivalent prohibition in Australian competition law, on which the Act is more broadly based.

5 My officials at the Ministry of Business, Innovation and Employment consulted on reforms to section 36 in early 2019. Submitters on the consultation paper were divided on this proposal. Many large firms and their legal representatives opposed the reform on the basis that they believe there is little evidence of a problem, that an Australian-style approach would allegedly chill competition and investment, and that it could result in pro-competitive conduct breaching the law.

6 I consider their concerns to be overstated. To the extent there are risks with the proposed reform, these will be outweighed by the likely benefits of the proposals, for example, a general increase in the level of competition in concentrated markets over time. This should have a flow-on benefit in terms of increased productivity and efficiency, lower prices, and higher quality goods and services.

Authorisation for anti-competitive unilateral conduct in the public interest

7 The Commission is able to grant authorisation to conduct that would otherwise breach the Act, for example, a restrictive trade practice. This process does not extend to conduct that is captured by section 36. The Bill will empower the Commerce Commission to authorise conduct that may contravene section 36, but which is in the public interest.

Repeal of the safe harbour provisions for intellectual property rights

8 Some intellectual property (**IP**) arrangements are currently exempt from the Act's prohibitions relating to cartels and anti-competitive agreements. At the time these provisions were enacted, IP rights and competition law were seen as being incompatible. This perception has since evolved and there is now a general consensus that the two are complementary, as both seek to promote innovation and provide long-term benefits for consumers.

9 The Bill removes the safe harbour provision for IP rights, to reflect that the original rationale for the provision no longer stands. The change will ensure that anti-competitive IP arrangements can be subject to appropriate scrutiny, ensuring that the consumer benefits associated with competition law (such as lower prices and greater choice) are shared across the economy.

10 Stakeholders had mixed views on the proposal to repeal the safe harbour for IP rights, with a small majority being in opposition to the reform. These views were particularly strong amongst IP lawyers and firms with IP-heavy business models. Their arguments included that there is little evidence of a problem with the current provision, that the amendment would reduce incentives to innovate, and that it risked increasing uncertainty and litigation.

11 I am confident that repealing the safe harbour provisions will have little impact on the majority of IP arrangements, and will also not materially impact on incentives to innovate and invest. I consider that the benefit from being able to ensure that all anti-competitive IP arrangements can be addressed under competition law outweighs the risks associated with reform, if any exist.

Technical changes to improve the functioning of competition law

Aligning the treatment of cartel provisions across covenants and contracts

12 The Bill brings the Act's treatment of cartel provisions in covenants into line with the prohibition on cartel provisions in contracts by also prohibiting covenants that create or implement a cartel.

13 Prior to a reform in 2017, the Act was consistent in its treatment of cartel arrangements. An oversight during that reform resulted in a discrepancy in the treatment of cartel arrangements arising under a contract versus a covenant, creating a loophole for cartel arrangements brought into effect by a covenant. The Bill restores the Act's pre-2017 position to close this loophole.

Clarifying the Act's application to interests in land

14 The Bill clarifies that the Act's prohibitions on collusion or exclusionary conduct apply to rights or interests in land, in the same way it applies to other kinds of property exchanged in trade.

15 This change responds to consultation, which concluded that there is market uncertainty about whether the prohibitions apply to interests in land. The objective is to clarify that, consistent with the Act's policy intent, interests in land are subject to the prohibitions against anti-competitive conduct. I do not consider that this would amount to an expansion of the Act's scope.

Greater enforcement penalties for anti-competitive conduct

16 Since 2018, a number of firms have chosen to engage in significant mergers or acquisitions at their own risk, without seeking clearance from the Commerce Commission. In these cases, the Commerce Commission must investigate and take enforcement action if it has competition concerns. This trend of proceeding with significant acquisitions in this way may reflect that the existing penalties in the Act for anti-competitive business acquisitions are insufficient to act as an effective deterrent.

17 To encourage corporate regulatory compliance, the Bill increases the maximum penalty for anti-competitive mergers and acquisitions to align with the maximum penalties for other forms of anti-competitive conduct. For individuals, the maximum penalty would remain at $500,000; however, in the case of a breach by any other entity, it would increase to the greater of $10 million, three times the commercial gain from the breach, or ten per cent of the turnover of the entity in question.

Increasing the maximum number of Commerce Commissioners

18 There has been an increase in the Commerce Commission's functions over time, however, the cap on the number of Commissioners provided for by the Act has not

changed. This has resulted in high workloads for the incumbent Commissioners and a risk of delays in decision-making.

19 The Bill increases the maximum number of Commissioners from six to eight, to provide flexibility for Cabinet to make additional appointments if desired.

Providing the Commission with information sharing powers

20 The Commerce Commission's broad, cross-economy remit means that its activities can overlap with those of other regulators, and information discovered during the course of an investigation may have relevance to those regulators. Currently, there is uncertainty about the Commission's ability to share confidential information with those bodies. This can impede regulatory cooperation, require duplication of effort and undermine the effective enforcement of the law.

21 The Bill would allow the Commission to share confidential information it holds in relation to its functions under the Act, or any other Act that it enforces, with other government agencies or statutory entities, subject to safeguards relating to the use and storage of that information. The Privacy Act 2020 would continue to apply in relation to sharing of personal information. The empowering provision in the Bill is consistent with the provisions in other pieces of legislation that confer similar information sharing powers on other regulators.

Two new policy issues

INTERNATIONAL RELATIONS

The meaning of "substantial" for the purposes of economic regulation

24 As a consequence of reforming section 36, it was necessary to redefine "substantial" for the purposes of the Act.

25 The Act has long made a distinction between the use of the term in the context of:

25.1 "substantial market power", where the courts have accepted that the requisite market power must be "considerable" or "large or weighty", and

25.2 "substantial lessening competition" which is defined in the Act as being "real or of substance", and which has been described by the courts as something more than minimal, being at least material and measurable. This is generally

seen as setting a lower threshold. The term "substantial lessening of competition" is the main competition test used throughout the Act for determining anticompetitive conduct, arrangements and mergers.

26 In the course of making this consequential amendment, it was identified that the lower threshold of "real or of substance" had not been excluded from the economic regulation provisions in Part 4 of the Commerce Act when it was amended in 2008. This is seen as a mistake. The test for when regulation may be imposed under Part 4 of the Act requires that the goods or services are supplied in a market where there is "little or no competition and little or no likelihood of a substantial increase in competition." If the threshold for the likelihood of an increase in competition is the lower one of 'real or of substance' rather than 'large or weighty', it may set an overly high hurdle and make regulation harder to impose, particularly when it is measured against a market that likely already has little or no competition.

27 On this basis, I consider that it would be more appropriate for "substantial" in this Part 4 context to be aligned with how it is understood in relation to a substantial degree of market power. That is, regulation under Part 4 would be excluded only if there was some likelihood of a "large or weighty" increase in competition. Consequently, I recommend that the Bill make a technical change to redefine "substantial" to mean "real or of substance" only when it is used in the context of a "substantial lessening of competition" in the Act.

Impact analysis

28 A Regulatory Impact Statement was prepared by the Ministry of Business, Innovation and Employment, in accordance with the necessary requirements, and was submitted at the time that Cabinet approval of the policy relating to the Bill was sought [CAB-20-MIN-0031 refers].

Compliance

29 I consider that the Bill complies with:

29.1 the principles of the Treaty of Waitangi;

29.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;

29.3 the disclosure statement requirements (a draft disclosure statement has been prepared and is attached to the paper);

29.4 the principles and guidelines set out in the Privacy Act 2020 (refer to discussion of views of the Office of the Privacy Commissioner in the consultation section of this paper);

29.5 relevant international standards and obligations;

29.6 the Legislation Design and Advisory Committee's Legislation Guidelines (2018 edition).

Consultation

30 My officials have undertaken several rounds of consultation on the policies to be given effect in this Bill.

30.1 Public consultation on options for reform relating to the main policies given effect in this Bill occurred in early 2019, including with business and industry representatives, legal advisers, and the Commerce Commission. The views of interested parties were taken into account during the policy process.

30.2 The Treasury, the Ministry of Justice, the Ministry of Foreign Affairs and Trade, and the Ministry for Primary Industries were consulted on the Cabinet paper which sought approval to policy proposals in February 2020.

30.3 The Treasury, the Ministry of Justice, the Ministry for Primary Industries, the Ministry of Transport, the Ministry for Foreign Affairs and Trade, and the Department of the Prime Minister and Cabinet were consulted on this paper and the Bill.

30.4 Colleagues from the coalition and confidence and supply partners in the previous term of Government were consulted prior to Cabinet policy decisions in February 2020.

Privacy Commissioner's feedback on the information sharing provisions

31 Officials consulted the Office of the Privacy Commissioner (**the OPC**) on the information sharing power in the Bill, and the Office confirmed it is consistent with the Privacy Act principles and guidelines.

32 The OPC, however, outlined their preference for two additional provisions to be inserted into the information-sharing power in the Bill to reflect best practice for the sharing of personal information. That is:

32.1 a requirement that the Commerce Commission notify an individual when their personal information has been disclosed; and

32.2 a requirement that the Commerce Commission report annually on the domestic disclosures that have been made under the information sharing power.

33 In response, I note that the existing protections under the Privacy Act will apply under the proposed information-sharing provisions. The changes suggested by the OPC would impose additional requirements on the Commission, despite there being no evidence that protections afforded by the Privacy Act are inadequate. Further, I note that these requirements are not a feature of the information-sharing powers in other comparable regulatory regimes.

34 I understand that the OPC considers the extra requirements are warranted because of the volume of information that the Commission collects, as compared with other regulators. However, I consider that the level of privacy protection afforded to information should be a function of the sensitivity of information held, as opposed to the volume.

35 After careful consideration of this feedback, I have decided not to reflect it in the Bill. The impact of the requirements is unclear, and introducing novel requirements could hinder the Commission's ability to share information with other agencies if it would assist them with carrying out their statutory functions, duties or powers.

Binding on the Crown

36 The Act binds the Crown to the extent the Crown engages in trade. As such, the proposed amendments in the Bill would equally bind the Crown. In accordance with Cabinet decisions, the Bill would not amend that position.

Creating new agencies or amending law relating to existing agencies.

37 The Bill will not create a new agency.

Allocation of decision making powers

38 The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

Associated regulations

39 Regulations are not required to bring the Bill into operation.

Other instruments

40 The Bill does not include a provision empowering the making of other instruments that are deemed to be legislative and/or disallowable instruments.

Definition of Minister/department

41 The Bill does not contain a definition of Minister, department, or chief executive of a department.

Commencement of legislation

42 The Bill provides that it will come into force one month after Royal assent, except for:

42.1 the new power for the Commission to accept and consider applications for authorisation of conduct to which section 36 might apply, which will come into force six months after Royal assent. This will allow firms to seek authorisation for any conduct that may be covered by the new prohibition in section 36 before it comes into effect; and

42.2 new section 36 of the Act (misuse of market power), the repeal of the safe harbours for IP rights, and the technical amendments relating to covenants, which will all come into force 12 months after Royal assent.

43 This timetable provides for most of the technical amendments, such as those relating to information sharing by the Commission, to come into force after one month. The substantive changes will come into force after 12 months, to allow the Commission

to develop guidelines and inform businesses before the new requirements come into effect.

Parliamentary stages

44 Subject to Cabinet approval, I intend to introduce the Bill to the House on 3 March 2021, and move its first reading during the week of 8 March 2021.

45 I intend to refer the Bill to the Economic Development, Science and Innovation Select Committee for their consideration, with a six month deadline to report the Bill back to the House.

CONSTITUTIONAL CONVENTION

Proactive Release

47 I intend to proactively release this paper in whole within 30 business days of a final Cabinet decision, subject to redaction as appropriate under the Official Information Act 1982. Redactions may be required if the Bill as introduced differs from the descriptions in this paper, to protect Crown legal privilege over draft legislation.

Recommendations

The Minister of Commerce and Consumers Affairs recommends that the Committee:

CONSTITUTIONAL CONVENTION

2 **note** that the Bill strengthens the prohibition on the misuse of market power in the Commerce Act 1986, repeals the safe harbour provisions for intellectual property rights, and makes a range of technical changes to improve the functioning of competition law;

INTERNATIONAL RELATIONS

5 **agree** to a consequential change to the definition of "substantial" in the Act, with the effect that for one of the thresholds for economic regulation under Part 4 of the Commerce Act, regulation would be excluded only if there was some likelihood of a "large or weighty" increase in competition in the market for the goods or services;

6 **approve** the Bill for introduction, subject to the final approval of the Government caucus and sufficient support in the House of Representatives;

7 **agree** that the Bill be introduced on 3 March 2021; and

8 **agree** that the Government propose that the Bill be:

8.1 referred to the Economic Development, Science and Innovation Select Committee for consideration for six months; and

CONSTITUTIONAL CONVENTION

Authorised for lodgement

Hon Dr David Clark
Minister of Commerce and Consumer Affairs