Submission

By

to the

Ministry for Business, Innovation & Employment

On the

Review of Fees for Clearance & Authorisation Applications under the Commerce Act 1986

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REVIEW OF FEES FOR CLEARANCE AND AUTHORISATION APPLICATIONS UNDER THE COMMERCE ACT 1986
SUBMISSION BY BUSINESS NEW ZEALAND[1]
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1. INTRODUCTION

1.2 BusinessNZ welcomes the opportunity to comment on the Ministry for Business, Innovation and Employment's (MBIE) discussion document, *Review of Fees for Clearance and Authorisation Applications under the Commerce Act 1986* (referred to as 'the Document'). While this is the second time within 10 years that these fee levels have been reviewed, we believe that the Ministry and the Commerce Commission (referred to as the 'Commission') need to consider more wide-ranging choices in regard to future options.

2. SUMMARY OF RECOMMENDATIONS

2.1 If the Commission does proceed with the proposal to increase the fees for clearance and authorisation in some way or form, BusinessNZ recommends that:

a) The Government provide an explanation as to how the proposed changes will make a significant and positive contribution to the Business Growth Agenda (p.5);

b) Option 4 receives no consideration (p. 6);

c) If fees are to change, the option of inflation adjustment since 1990 is first considered (p. 7); and

d) The Commission investigates the possibility of a two-tiered system whereby small-medium sized entities are exempt from clearance and authorisation fee charges (p. 8).

2.2 However, BusinessNZ's preferred recommendation is that:

e) Consideration is given to a zero fee cost for clearance and authorisation applications for all entities (p. 6).

3. BUSINESSNZ'S OVERARCHING VIEW ON COST RECOVERY BY GOVERNMENT AGENCIES

3.1 Question 1 in the Document asks *what factors are relevant in setting a fee? In addition to the factors discussed in this document, are there other factors that might also be relevant?* Given various government agencies provide a wide range of goods and services where cost recovery (or some portion of cost) is required of specific groups, including customs, transport, electricity, fisheries etc, it is important to start with the base questions when undertaking a review of fees where the Government collects funds from the private sector. Some of these questions include, but are not confined to:

[1] Background information on Business New Zealand is attached in the appendix.

- Is the good provided largely of a “public” or of a “private” good nature?
- Are the beneficiaries of the good or service able to be clearly determined?
- Are there alternative (contestable) choices?
- Are there wider benefits beyond those immediately identified?
- Do users agree to the charges being implemented (i.e. see clear benefits in paying for a particular good or service) or do they oppose simply because they are “free-riders”?
- Have users (payers) been adequately consulted in the design of the charging regime to avoid the potential for “gold-plated” services to be provided?
- Is charging going to increase efficiency?
- What are the transaction costs involved?

3.2 In terms of the appropriateness of cost recovery mechanisms, the fundamental point to be acknowledged up-front is that this will largely depend on the nature of the good or service provided. Each case needs to be determined on its merits. There can well be justification for changes on efficiency grounds but the nature of the charge needs serious consideration to avoid obvious risks such as government simply passing on the costs of inefficiencies (or minimising its own risk through gold-plating). A review of the fees for clearance and authorization applications is no different, especially when account is taken of prior fee setting reviews.

3.3 As paragraph 9 of the Document points out, the Government, via the Commerce Act, has put in place a set of rules to ensure the promotion of competition in markets for the long-term benefit of consumers within New Zealand. This is done through a series of core prohibitions that deter anti-competitive mergers or conduct in this country. The voluntary clearance and authorisation regimes designed to facilitate the Commerce Act purposes provide businesses with a way to test with the Commission whether a proposed merger or conduct raises competition issues. If it does, it then asks whether there are public benefits that outweigh any competition concerns.

3.4 Given the merits of this case, the establishment of the clearance and authorisation regimes provides benefits for both the Government and those entities that apply. The ‘public good’ case provides a strong argument for charging at less than full cost, and we would take the view that any thought of charging at full cost would lead to a significant loss of public benefit. To that point, pages 12-13 of the Document outline the benefits to private entities from the regimes, including whether or not an entity pursues or refrains from pursuing an activity altogether. However, given the overall regime is in place because of the Government legislation, and that the clearance regime provides a way to minimise difficult and expensive actions to undo anti-competitive acquisitions or stop anti-competitive behaviour, BusinessNZ believes the greater cost of the regime should fall on the Government as opposed to the entities concerned. Therefore, we are pleased to see that paragraph 6 states that even with the increases proposed, the Government will continue to shoulder the vast majority of the Commission’s assessment costs.

4. The 2004 Review

4.1 BusinessNZ took the opportunity to submit in 2004 on the Ministry of Economic Development's discussion document, *Fees for Clearance and Authorisation Applications*. The 2004 document outlined two broad options, a full cost recovery approach and changes to the current regime of a cost sharing approach.

4.2 In our submission during that time, we shared the same view as the Commission that the disadvantages of a full cost recovery approach significantly outweighed the advantages. Therefore, we were totally opposed to giving any consideration to full cost recovery.

4.3 The second option of a cost-sharing approach involved splitting costs between the applicant and the Commission and the 2004 document outlined two options, the current flat fee system or a tiered fee system.

4.4 We mentioned that a flat fee structure would provide entities with certainty of costs, rather than costs determined by complex discussion with the Commission. Small-medium sized entities in particular would be most likely to be discouraged from making clearance and authorisation applications.

4.5 The other cost-sharing approach outlined was a tiered fees approach, where if the cost to the Commission of an application exceeds a monetary threshold, the applicant would be liable for a greater fee. The standard fee would accompany the application, but any crossing of the threshold would see the applicant liable for the difference between the higher fee and the standard fee.

4.6 Despite the Commission indicating there would be in checks in place ensuring applicants were notified within a certain timeframe of the cost exceeding the threshold, and would have the option of withdrawing their application, the increase in cost would have been extremely sizeable. We noted that the imposition of an additional threshold fee (again using mid-points of the range) could increase the cost at that time from anywhere from 425% to 1,025%, if the proposed new standard fee were also taken into account.

4.7 We agreed with the points raised in the 2004 Document that it would be difficult to identify a particular entity's price sensitivity, given the wide range of sizes and resources of the entities that would make applications. However, given the 'grey area' regarding applications to the Commission, the fee charged would be a strong factor determining whether or not to make an application. Therefore, we believed that the substantial fee increase for either cost-sharing approach would discourage entities, particularly small-medium sized ones, from making applications. Therefore, neither cost sharing proposal was considered viable.

5. The 2014 Discussion Document

5.1 As paragraph 50 of the Document points out, following the review in 2004, Cabinet agreed to retain the flat fee structure, and to increase the level of application fees. However, the actual increase never took place given

changes to the Act were required to ensure that application fees did not exceed the cost to the Commission of determining the application. There was also concern that the level of fees might prevent some classes of persons from applying for clearance or authorisation.

5.2 It is also worthy to note the other point made in paragraph 50 that:

As a result, changes to the Act were introduced to allow the Commission to refund all or part of a fee that is more than the cost to the Commission of determining that application, and also to allow an exemption from the requirement to pay application fees for certain classes of persons. These amendments were made by the Commerce (International Co-operation, and Fees) Amendment Act that was passed on 24 October 2012.

5.3 Regarding possible future changes, the Document outlines four options to comment on, namely:

- *Option 1: Status quo.*
- *Option 2: Implementing fee increases previously agreed by Cabinet.*
- *Option 3: Adjusting the increases previously agreed by Cabinet to reflect inflation.*
- *Option 4: Based on median costs to the Commission.*

Table 1 below summarises the four options under consideration in the Document. In addition, we have included an estimate of what the revised 1990 value would be after inflation is taken into account[2].

Table 1: Current and proposed fees in 2014 discussion document

Type of application	Option 1 (current fee)	Option 2	Option 3	Option 4	Inflation adjusted since 1990
S66 – merger clearance	$2,000	$7,000	$8,600	$31,000	$3,280
S67 – merger authorisation	$20,000	$30,000	$36,000	$178,000	$32,800
S58 – restrictive trade practice authorisation	$10,000	$30,000	$36,000	$71,000	$16,400
Proposed new s65A – collaborative activity clearance	n/a	$7,000	$8,600	$31,000	n/a

6. Observations & Preferred Option Going Forward

Timing of the Review

6.1 In 2004, we pointed out that a period of economic downturn which translates into a sustained period of meagre tax revenue that does not cover core Government expenses often leads to reviews of fees structures and cost-sharing issues between the Government and the private sector. Therefore, if this review had taken place a few years ago during the height of the Global Financial Crisis, we would at least better understand the reasoning of looking to increase the level of fees.

[2] Based on the Reserve Bank inflation calculator.

6.2 Since 2008, the New Zealand Government has gone through a period of deficits, and its books have only very recently returned back to a surplus. Since the review's policy objective is to identify the appropriate cost distribution between applicants and the Government for costs incurred by the Commission, BusinessNZ believes this turn back to a surplus, projected to continue for the foreseeable future, poses two questions. First, if the need to change fee setting to assist in recouping funds was so crucial, why didn't the follow-up review take place earlier? Second, given projected surpluses, why would a change be proposed at a time when the Government is able to sustain the present distribution of cost for the notification regime without any fees increases? The answer to both these questions calls in question the need for the latest review.

Proposed changes through the Business Growth Agenda lens

6.3 In addition, given its critical part in the current Government's growth plan, BusinessNZ is disappointed to see that there is no mention in the Document of how the proposed changes fit within the Business Growth Agenda (BGA). The Government has publicly stated that the BGA is an ambitious programme of work that will support New Zealand businesses to grow, in order to create jobs and improve New Zealanders' standard of living.

6.4 As far as BusinessNZ can ascertain, the only discussion within the recent BGA Future Direction document that is remotely relevant to the fees review issue is via a mention of the Commerce (Cartels and Other Matters) Amendment Bill in the *Building Innovation* section of the BGA, whereby its intent it to clarify the law in relation to pro-competitive collaborative arrangements.

6.5 A fundamental question is whether the proposed fee increases in fees will make a positive contribution to the BGA? BusinessNZ is struggling to think of a significant reason why the increase in fees would provide a positive contribution. It is possible that the additional money raised will mean the Commission can carry out other work, although as discussed below, to say so might be a long bow to draw.

Recommendation: That the Government provides an explanation as to how the proposed changes will make a significant and positive contribution to the Business Growth Agenda.

Projected revenue from application fees

6.6 Page 22 of the Document outlines the actual deficit/surplus to the Crown as well as the projected revenue under the various proposals assuming no change in the number of applications over the last four years. What is noticeable from the Document's table 12 is that in the absence of s67 and/or s58 applications, the deficit to the Crown reduces dramatically, with a deficit of around $741k in 2012/13, compared with an average of $2.58m from 2009 to 2011.

Table 2: Deficit figures and Change Amount from tables 12 and 13 on page 22 of the Discussion Document

	2012/13	2011/12	2010/11	2009/10
Actual deficit	**-$741,000**	**-$2,688,000**	**-$2,531,000**	**-$2,515,000**
Option 2 saving	**$50,000**	**$85,000**	**$70,000**	**$55,000**
Option 3 saving	**$66,000**	**$111,400**	**$98,000**	**$72,200**
Option 4 saving	**$290,000**	**$383,000**	**$606,000**	**$264,000**

6.7 Table 12 shows both the projected additional revenue from the three options and the revised deficit but does not show the actual change in the deficit to the Crown for each year (shown in table 2 above). For simplicity's sake, taking the midpoint of funding from 2009 to 2012 and using the 2011/12 values for the Commerce Commission's total appropriations of $31.6m and the Crown's Vote Commerce estimates of appropriations of $141m, savings in terms of minimising the deficits are small. For instance, the largest differential saving of $606,000 represents only 2% of the Commission's total appropriations, and a tiny 0.4% of the Crown's Vote Commerce allocation. However, as mentioned above, we do not believe option 4 is being seriously considered. While even the highest value for the lowest differential ($85,000) would represent only 0.27% of the Commission's total appropriations, or 0.06% of the Crown's Vote Commerce allocation. In short, the most realistic option (discussed more in the next section) shows that any change in fee levels will have an overall minimal effect on the Commission's budget/appropriations.

6.8 Given that in some instances the Commission views the current fee structure as not covering even 10% of the Commission's recovery costs, a zero fee approach would provide the ideal opportunity for money that would otherwise have gone to the Commission to be kept by the applicant and invested back into the business.

Primary Recommendation: That consideration is given to a zero fee cost for clearance and authorisation applications for all entities.

7. Examining the 2014 Options

7.1 Notwithstanding our primary recommendation above, BusinessNZ would also like to express our view on preferred steps were fees to increase.

7.2 As table 1 shows, the Document has outlined a series of options for future fee settings, ranging from retaining the current level through to an option based on median costs that will result in the largest fee increases. BusinessNZ would like to provide its views on options 2, 3 and 4 in reverse order.

Option 4 – the scaremonger option

7.3 First, option 4 is based on the median costs (excluding overheads), which show rises ranging from 610% to 1450%. Like the 2004 review's full cost recovery approach, we view the median approach as simply illustrating a worst case scenario of extreme cost rises, making other options for change appear not as severe by comparison. Therefore, we would be highly surprised if this option has been or will be given any real consideration.

Recommendation: That option 4 receives no consideration.

Options 2 and 3 – a shaky base

7.4 Option 2, apart from the status quo, provides for the lowest increase in fees of all the options for change. However, it is based on the proposed fee increases agreed by Cabinet in 2005, while option 3 adjusts the values from option 2 by taking inflation into account.

7.5 BusinessNZ is not against the idea of examining fee levels per se, but finds it somewhat strange that half the options for the 2014 review, namely options 2 and 3, are based on fees agreed by Cabinet in 2005 that were never actioned. Therefore, there is no way to show the impact of an increase in fees (either good or bad).

7.6 In addition, it is important to revert back to the original discussion papers which made Cabinet decide to change the fees in the first place. Table 3 below shows the proposed fee changes in 2004 that were for the cost sharing approach via the flat fee structure, along with the approved Cabinet decision. However, the proposed range of fee values presented to Cabinet in the 2004 document was arbitrary to say the least. In fact, the 2004 document noted the proposed fee range was merely a suggested range, mainly due to the wide divergence in actual costs to the Commission.

Table: 3: 2004 proposed free changes

Type of application	Current fee	2004 proposed fee	2005 Cabinet decision
s66	$2,000	$5,000-$10,000	$7,000
s67	$20,000	$30,000-$35,000	$30,000
s58	$10,000	$25,000-$35,000	$30,000

7.7 The original proposed fee ranges did not appear to subscribe to any recognised formula or process such as the rate of inflation. Because of this, Cabinet's final decision in 2005 seems to have been based on choosing the mid-point for s58 and s66, while choosing the bottom range figure for s67. In reality, options 2 and 3 in the 2014 Document are based on a 2005 decision not wedded to any coherent logic and which therefore calls into question the logic of the 2014 options.

Not all inflation is created equal

7.8 Furthermore, if MBIE is willing to include an option that simply adds inflation to the proposed 2005 values (i.e. option 3), why can it not also provide an option that seeks to inflation adjust the fee levels first introduced in 1990? Table 1 shows the inflationary increases for the current fees for S66, S67 and S58 would be 64%. Although one could argue that the inflationary pressures within the Commission are different from the overall inflation figure via the Consumer Price Index (CPI), inflation adjusted fee levels would at least enable the private sector to understand the reasoning behind the proposed changes, rather than selecting arbitrary values.

Recommendation: If fees are to change, the option of inflation adjustment since 1990 is first considered.

8. A Two-Tiered Approach?

8.1 Last, the appendix of the Document provides clearance and authorisation regimes in overseas jurisdictions, including Australia, Canada, the U.K and the U.S. The same information was also provided for the 2004 discussion document, and shows that all these countries tend to have some type of tiered system in place, based on factors such as size of parties, size of transaction and turnover. Obviously, any direct comparison with New Zealand's system is difficult, not only due to the design of the different competition regimes but also to more practical considerations such as the number of clearance and authorisations likely in these much larger countries in any given year.

8.2 However, as noted in paragraph 5.2 above, legislation provides for an exemption to be introduced from the requirement to pay application fees for certain classes of persons. Given the proposed fees are more likely to impose a relatively stronger impact on small to medium sized enterprises, at the very least the Government should consider looking at options that involve some type of exemption or tiered approach.

8.3 Future options could involve a complete exemption of fee payments for those identified as small and medium entities and deemed to be within a particular threshold. Entities outside the threshold would pay the fee amounts currently in place, or if changes to fee levels were to proceed, at the level that takes into account inflationary effects since 1990.

Recommendation: The Commission investigates the possibility of a two-tiered system whereby small-medium sized entities are exempt from clearance and authorisation fee's charges.

APPENDIX

9. About Business New Zealand

9.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 45-member Major Companies Group (MCG), which comprises New Zaland's largest companies, as well as its 75-member Affiliated Industries Group (AIG) that comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

9.2 In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

9.3 Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.