Commerce (Cartels and Other Matters) Amendment Bill

Government Bill

As reported from the Commerce Committee

Commentary

Recommendation

The Commerce Committee has examined the Commerce (Cartels and Other Matters) Amendment Bill and recommends that it be passed with the amendments shown.

Introduction

The Commerce (Cartels and Other Matters) Amendment Bill would amend the Commerce Act 1986 to allow pro-competitive collaboration between firms, while also deterring anti-competitive hard-core cartel conduct.

In relation to cartels, the bill would

- clarify the scope of prohibited behaviour
- introduce new exemptions, including exemptions for collaborative activities and vertical supply arrangements
- introduce criminal sanctions for hard-core cartel behaviour.

The bill also proposes a number of other amendments to the Act, for purposes including

- clarifying the scope of the jurisdiction of the legislation

- introducing a new regime to regulate overseas acquisitions with adverse competition effects in a market in New Zealand
- amending the authorisation process to reduce the associated risk and cost.

Following the release of a report by the Productivity Commission on its inquiry into international freight transport services, the Minister of Commerce requested on 3 September 2012 that we consider the transitioning of international shipping and international civil aviation to competition regimes governed by the Commerce Act. We called for and received further submissions on this issue and have recommended amendments accordingly.

Our commentary covers the key amendments that we recommend to the bill. It does not cover minor or technical amendments proposed to improve workability, clarity, and legal efficacy.

Jurisdiction

Clause 5 as introduced is modelled on section 7 of the Crimes Act 1961. It would extend the jurisdiction of the legislation to acts committed outside New Zealand where an act or omission related to an offence that occurred in New Zealand.

We recommend amending clause 5 to remove the reference to "events necessary to the completion of any offence". We believe this jurisdiction would be too broad, as many acts that occur overseas can affect markets in New Zealand.

We also recommend amending clause 5 by inserting a new provision to clarify the relationship between the jurisdictional provisions in section 4 of the Commerce Act and the attribution provisions in section 90. We believe this would make it clear that if the conduct of a person in New Zealand is attributed to an overseas person by virtue of section 90, the conduct of the overseas person is to be treated as occurring in New Zealand.

Clearance regime

The regime set out in the bill as introduced would allow companies to apply to the Commerce Commission to test whether a proposed collaboration would raise competition issues. This would allow companies to manage the risk that a proposed collaborative arrangement might be prohibited.

Transitional arrangement relating to price fixing

For existing arrangements entered into before the enactment of the bill, rather than extending the clearance regime we recommend amending clause 7 (inserting new section 30C) to include a transitional arrangement whereby there would be no proceedings against such existing arrangements for 9 months from the commencement date. For that period, the existing section 30 provision relating to price fixing provisions would apply to these agreements as though section 30 had not been repealed. We believe that a reasonable transition period would allow parties to existing arrangements to review their arrangements and adjust their affairs as necessary.

Assessment of contract or arrangement for cartel provisions

We recommend amending clause 12 (new section 65A) to make it clear that the commission, not the applicant, would assess a contract, arrangement, or understanding for cartel provisions. Under the bill as introduced, the commission might not be able to consider whether there were any other cartel provisions that raise concerns other than those identified by the applicant. We also recommend limiting the scope of the clearance to that which is necessary to give businesses certainty to undertake their collaborative activity. We recommend that the commission be required to assess the contract, arrangement, or understanding in question, rather than the collaborative activity.

Revocation of a clearance

We also recommend amending clause 12 (inserting new section 65D) to allow the commission to revoke a clearance after a material change of circumstances. Clearance provides substantial benefit in that it confers continuing immunity from prosecution. We believe this immunity should not be unlimited, as this could result in substantial damage to competition in the long term. Before revoking a clearance after a material change of circumstances, the commission should be required to show that the change was in fact material, and to substantiate the reasons for its decision. Parties with an interest in the arrangement would be given a reasonable opportunity to make submissions to the commission regarding the revocation of clearance. Parties would still be allowed to apply for authorisation for arrangements that are in the public interest.

Authorisations for restrictive trade practices

The authorisation regime would allow parties to apply to the Commerce Commission for authorisation of an arrangement. Unlike a clearance, which would confirm that a transaction did not contravene the Act, authorisation would exempt conduct from the relevant prohibitions in the Act on the basis that there was an overriding benefit to the public. In other words, it would permit a transaction that lessened competition but gave rise to such efficiencies that it could be justified.

We recommend inserting new clause 10A to move new subsection (3A) from new section 65C to section 60. Moving this provision would clarify that the commission could consult any person who could assist it in determining the application.

We also recommend inserting new clause 10B (amending section 61) to provide for an authorisation decision period of 120 working days, to give parties more certainty about timeframes.

Bid rigging

For simplicity and clarity, we recommend deleting references to bid rigging from the bill (clauses 7 and 18). We believe that defining bid rigging as an additional and overlapping category would create uncertainty, and that prohibiting the other categories of cartel conduct (price fixing, restricting output, and market allocating) would adequately prevent anti-competitive bidding practices.

We recommend a consequential amendment to clause 7 to delete the disclosure requirement in new section 30A(5)(b), which we consider unnecessary.

Exemption for maximum resale prices

We recommend amending clause 7 (section 32) to provide an explicit exemption from the prohibition on cartel conduct for suppliers stipulating maximum resale prices. We believe that maximum resale prices are pro-competitive, and that this amendment would ensure

New Zealand's approach to this issue is consistent with that of Australia.

Acquisitions outside New Zealand that affect competition in New Zealand

When applying the Commerce Act to conduct outside New Zealand, we believe it is important to ensure that the courts can grant effective relief and enforce judgments against overseas parties, particularly when overseas acquisitions affect a market in New Zealand.

Application of the regime

Clause 8 (inserting new section 47A) provides for the commission to seek a declaration where an overseas person acquires a controlling interest in a New Zealand body corporate. We recommend amending clause 8 to make it clear that it would apply only if the acquisition occurred outside New Zealand. We recommend an amendment to specify that the controlling interest could be acquired either by acquiring shares or by acquiring the business assets of the New Zealand body corporate.

Controlling interest test

We recommend amending the controlling interest test in clause 8 (new section 47A(4)) to reduce the threshold of votes, issued shares, or dividend entitlement from 50% to 20%. The bill as introduced would allow the Commerce Commission to apply for a declaration where an overseas person acquired a controlling interest in a New Zealand company, with the controlling interest threshold set at 50%. The 50% threshold sets a higher threshold for intervention than the test that would be applied if the merger were between two domestic entities. A 20% threshold would be consistent with that in the Takeovers Code.

Lay members of High Court in certain cases

We recommend inserting new clause 13A to allow lay members of the court to be appointed to assist the court in civil proceedings in relation to section 30 as well as section 27. Sections 27 and 30 are often pleaded in the alternate, so we believe it makes sense to allow lay members input in relation to both sections.

Criminal offence: honest belief defence

Clause 18 would insert new section 82B, which sets out criminal sanctions for cartel behaviour. We believe that criminal sanctions should be reserved for conduct that is truly culpable. A person should have intended to engage in the conduct in question, or at the very least have been reckless as to its consequences, to attract such sanctions.

For this reason we recommend amending the honest belief defence in clause 18 (new section 82B(2)) so that it would apply only to a defendant involved in a collaborative activity exercising the defence that they honestly believed that the cartel provision of the contract was reasonably necessary for the purpose of the collaborative activity.

We believe the defence proposed in the bill as introduced is too broad, applying to exemptions for vertical supply contracts, joint buying, and promotion agreements. No exercise of judgment is required in these situations, so no honest belief defence could apply. The term “reasonably necessary” requires the exercise of judgment in which a person could make an honest mistake. We believe that the understanding of the phrase “reasonably necessary” will continue to be developed through case law and Commerce Commission guidelines and practice.

Penalties

We recommend inserting new clause 13B (inserting new section 79B(3)) to provide for the stay of pecuniary penalty proceedings if criminal proceedings are commenced in respect of the same or similar conduct. Other statutes contain equivalent provisions regarding civil and criminal responses to the same conduct.

We also recommend amending clause 15 (substituting new section 80A) so that a person could not be indemnified in respect of criminal and civil liability.

International shipping

We recommend inserting new clauses 23A and 23B to repeal the separate competition regime established under the Shipping Act 1987 and to allow international shipping to be covered by the Commerce Act. We recommend amending clause 2(2) to provide for a two-year transitional period for provisions relating to amendments to the Shipping Act. We also propose inserting new clause 23C to provide for further transitional arrangements for these changes.

We do not believe there is good reason for treating international shipping differently from other sectors regulated by the Commerce Act. We consider that the carriage of goods by sea between places in New Zealand and places outside New Zealand should be subject to the generic competition regime under the Commerce Act.

Civil aviation

Competition in international air services is currently regulated by Part 9 of the Civil Aviation Act 1990 and the Commerce Act. A review of the Civil Aviation Act is in progress, and will provide an opportunity for a policy process to consider passenger-specific impacts and other concerns about the implications of changing the competition regime for international air services. We recommend that a transition to a Commerce Act regime be considered in the wider review of the Civil Aviation Act.

Franchise arrangements

We encourage the Commerce Commission to develop specific guidelines for its application of the provisions of the bill to various franchise systems. This would provide more certainty as to whether the collaborative activity exemption might be applied to particular franchise arrangements.

Appendix

Committee process

The Commerce (Cartels and Other Matters) Amendment Bill was referred to the committee on 24 July 2012. The closing date for submissions was 6 September 2012. The committee presented an interim report on the bill on 28 September 2012. The closing date for submissions on the changes to shipping and civil aviation was 18 October 2012. We received and considered 41 submissions and supplementary submissions from interested groups and individuals. We heard 16 submissions.

We received advice from the Ministry of Business, Innovation and Employment and the Ministry of Transport.

Committee membership

Jonathan Young (Chairperson)

Kanwaljit Singh Bakshi

Dr David Clark

Hon Clayton Cosgrove

Clare Curran

Peseta Sam Lotu-Iiga

Mojo Mathers

Mark Mitchell

Dr Jian Yang

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Craig Foss

Commerce (Cartels and Other Matters) Amendment Bill

Government Bill

Contents

The Parliament of New Zealand enacts as follows:

1 Title

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

2 Commencement

(1) This Act, except ~~**section 18**~~ **sections 18, 23A, and 23B**, comes into force on the day after the date on which it receives the Royal assent.

(2) **Section 18** (which imposes criminal sanctions in respect of certain conduct relating to cartels) ~~comes~~ and **sections 23A and 23B** (which relate to the repeal of parts of the Shipping Act 1987) come into force on the day that is 2 years after the date on which this Act receives the Royal assent.

3 Principal Act amended

This Act amends the Commerce Act 1986.

Part 1
Substantive amendments to principal Act

4 Interpretation

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

"**cartel provision** means a provision described in **section 30A**

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

Jurisdiction

5 Application of Act to conduct outside New Zealand

(1) The heading to section 4 is amended by omitting "**to conduct outside New Zealand**".

(2) Section 4 is amended by inserting the following subsection before subsection (1):

"(1AA) For the purposes of this Act,—

"(a) a person engages in conduct in New Zealand if any act or omission forming part of the conduct occurs in New Zealand; and

"(b) a person (**person A**) engages in conduct in New Zealand if another person (**person B**) engages in conduct in New Zealand, and the conduct of person B is deemed (by virtue of **section 90**) to be the conduct of person A."

~~Section 4 is amended by adding the following subsection:~~

~~"(4) For the purpose of determining jurisdiction,—~~

~~"(a) if an act or omission that forms part of a contravention of this Act occurs in New Zealand, the contravention is deemed to have occurred in New Zealand; and~~

~~"(b) if an event that is necessary to the completion of a contravention of this Act occurs in New Zealand, the contravention is deemed to have occurred in New Zealand."~~

6 Section 29 repealed

Section 29 is repealed.

Cartels

7 New heading and sections 30 to 33 substituted

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

"*Cartel provisions*

"30 Prohibition on entering into or giving effect to cartel provision

"(1) No person may, unless an exemption in **section 31, 32, or 33** applies,—

"(a) enter into a contract or arrangement, or arrive at an understanding, that contains a cartel provision; or

"(b) give effect to a cartel provision.

"(2) *See* section 80 for liability to a pecuniary penalty, and **section 82B** for criminal liability, for contravention of this section.

"30A Meaning of cartel provision and related terms

"(1) A **cartel provision** is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of 1 or more of the following <u>in relation to the supply or acquisition of goods or services in New Zealand</u>:

"(a) price fixing:

"(b) restricting output:

"(c) market allocating.

~~"(d) bid rigging.~~

“(2) In this Act, **price fixing** means, as between the parties to a contract, arrangement, or understanding, fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of,—

“(a) the price for goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or

“(b) any discount, allowance, rebate, or credit in relation to goods or services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other.

“(3) In this Act, **restricting output** means preventing, restricting, or limiting, or providing for the prevention, restriction, or limitation of,—

“(a) the production or likely production by any party to a contract, arrangement, or understanding of goods that any 2 or more of the parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or

“(b) the capacity or likely capacity of any party to a contract, arrangement, or understanding to supply services that any 2 or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other; or

“(c) the supply or likely supply of goods or services that any 2 or more parties to a contract, arrangement, or understanding supply in competition with each other; or

“(d) the acquisition or likely acquisition of goods or services that any 2 or more parties to a contract, arrangement, or understanding acquire in competition with each other.

“(4) In this Act, **market allocating** means allocating between any 2 or more parties to a contract, arrangement, or understanding, or providing for such an allocation of, either or both of the following:

“(a) the persons or classes of persons to or from whom the parties supply or acquire goods or services in competition with each other:

"(b) the geographic areas in which the parties supply or acquire goods or services in competition with each other.

~~"(5) In this Act, **bid rigging** means restraining 1 or more parties to a contract, arrangement, or understanding from making a bid, or requiring a bid to be in accordance with a contract, arrangement, or understanding, where—~~

~~"(a) the parties to the contract, arrangement, or understanding are in competition with each other for the supply or acquisition of the goods or services that are the subject of the bid; and~~

~~"(b) the essential features of the contract, arrangement, or understanding are not disclosed to the person running the bid before the bid is lodged.~~

~~"(6) For the purpose of **subsection (5)**, **bid** includes—~~

~~"(a) a tender; and~~

~~"(b) any step preliminary to making a bid, such as giving an expression of interest.~~

"30B Additional interpretation relating to cartel provisions

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

"(a) if a person is a party to a contract, arrangement, or understanding, each of the person's interconnected bodies corporate is taken to be a party to the contract, arrangement, or understanding; and

"(b) if a person (**person A**) or any of person A's interconnected bodies corporate supplies or acquires goods or services in competition with another person (**person B**) or any of person B's interconnected bodies corporate, person A is taken to supply or acquire those goods or services in competition with person B; and

"(c) a reference to persons in competition with each other for the supply or acquisition of goods or services includes a reference to—

"(i) persons who are, or are likely to be, in competition with each other in relation to the supply or acquisition of those goods or services; and

"(ii) persons who, but for a cartel provision relating to those goods or services, would, or would be likely to, be in competition with each other in relation to the supply or acquisition of those goods or services.

“30C Temporal application of cartel prohibition

“(1) **Section 30(1)(a)** (which relates to entering into a contract or arrangement, or arriving at an understanding, that contains a cartel provision) applies only to contracts, arrangements, or understandings that are entered into or arrived at after **section 30** comes into force.

“(2) **Section 30(1)(b)** (which relates to giving effect to a cartel provision in a contract, arrangement, or understanding) applies only to conduct occurring after **section 30** comes into force, but applies whether the contract, arrangement, or understanding was entered into or arrived at before or after that section comes into force, and whether or not it has been suspended at any time.

“(3) Despite **subsection (2)**, during the first 9 months after the date on which this section comes into force, no proceedings under section 80 may be commenced for a contravention of **section 30(1)(b)** in relation to a contract, arrangement, or understanding that was entered into or arrived at before this section came into force and that, at that time, contained or may have contained a cartel provision.

“(4) However, during that 9-month period, proceedings under section 80 may be commenced in relation to a contract, arrangement, or understanding referred to in **subsection (3)** as if section 30, as it was before it was replaced by the Commerce (Cartels and Other Matters) Amendment Act **2011**, was still in force.

“30D Cartel provisions generally unenforceable

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

“(2) However, nothing in **subsection (1)** affects the enforceability of a cartel provision in any contract to which **section 31, 32, or 33** applies.

“31 Exemption for collaborative activity

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

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

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

“(2) In this Act, **collaborative activity** means an enterprise, venture, or other activity, in trade, that—

“(a) is carried on in co-operation by 2 or more persons; and

“(b) is not carried on for the dominant purpose of lessening competition between any 2 or more of the parties.

“(3) The purpose referred to in **subsection (2)(b)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

“32 Exemption for vertical supply contracts

“(1) Nothing in **section 30** applies to a person who enters into a contract that contains a cartel provision, or who gives effect to a cartel provision in a contract, if—

“(a) the contract is entered into between a supplier or likely supplier of goods or services and a customer or likely customer of that supplier; and

“(b) the cartel provision—

“(i) relates to the supply or likely supply of the goods or services to the customer or likely customer, or to the maximum price at which the customer or likely customer may resupply the goods or services; and

“(ii) does not have the dominant purpose of lessening competition between any 2 or more of the parties to the contract.

"(2) The purpose referred to in **subsection (1)(b)(ii)** may be inferred from the conduct of any relevant person or from any other relevant circumstance.

"33 Exemption for joint buying and promotion agreements

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

"(a) relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by some or all of the parties to the contract, arrangement, or understanding; or

"(b) provides for joint advertising of the price for the resupply of goods or services acquired in accordance with **paragraph (a)**; or

"(c) provides for a collective negotiation of the price for goods or services followed by individual purchasing at the collectively negotiated price; or

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

Acquisitions by overseas persons

8 New sections 47A to 47D inserted

The following sections are inserted after section 47:

"47A Declaration relating to acquisition by overseas person

~~"(1) The Commission may apply to the High Court for a declaration under this section if—~~

~~"(a) an overseas person acquires shares in a New Zealand body corporate; and~~

~~"(b) the acquisition results in the overseas person acquiring a controlling interest in the New Zealand body corporate.~~

"(1) The Commission may apply to the High Court for a declaration under this section if an overseas person acquires a controlling interest in a New Zealand body corporate through the acquisition outside New Zealand of the assets of a business or shares.

"(2) The High Court may make a declaration that it is satisfied that the acquisition of shares by the overseas person has, or is likely to have, the effect of substantially lessening competition in a market in New Zealand.

"(3) A declaration may not be made in respect of an acquisition if—

"(a) the application for the declaration is made more than 12 months after the date of the acquisition; or

"(b) the Commission has given a clearance, or granted an authorisation under Part 5, in respect of the acquisition.

"(3A) Nothing in this section limits the Commission's functions or powers under any other provision of this Act.

"(4) In this section and in **sections 47B to 47D**,—

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

"(a) controls the composition of the board of the body corporate; or

"(b) is in a position to exercise, or control the exercise of, more than ~~50%~~ 20% of the maximum number of votes that can be exercised at a meeting of the body corporate; or

"(c) holds more than ~~50%~~ 20% of the issued shares of the body corporate, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or

"(d) is entitled to receive more than ~~50%~~ 20% of every dividend paid on shares issued by the body corporate, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital; or

"(e) is the holding company (as defined in section 5(2) of the Companies Act 1993) of the body corporate

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

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

“47B Orders following declaration under section 47A

“(1) If the High Court makes a declaration under **section 47A** in relation to a New Zealand body corporate, it may make an order under this section requiring the New Zealand body corporate to—

“(a) cease carrying on business in New Zealand, in the market to which the declaration relates, no later than 6 months after the date of the declaration or any longer period specified by the court; or

“(b) dispose of shares or other assets specified by the court; or

“(c) take any other action (including disposing of shares or other assets) that the court considers, in all the circumstances, is consistent with the purpose of this Act.

“(2) Contravention of an order made under this section is deemed to be a contravention of this section.

“47C Application by Commission for declaration

“(1) An application for a declaration under **section 47A** may be made only by the Commission.

“(2) On making an application under **section 47A**, the Commission must give notice of the application to the relevant overseas person and New Zealand body corporate.

“47D Revocation and variation of declarations and orders

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

“(2) The High Court may, if is satisfied that there has been a material change of circumstances, do either or both of the following:

“(a) revoke the declaration:

“(b) revoke or vary any order.”

Amendments relating to authorisations for restrictive trade practices

9 Effect of authorisation

(1) Section 58A(1) is amended by omitting all the words before paragraph (a) and substituting "While an authorisation under section 58(1) remains in force, nothing in section 27, **30, or 30D** prevents an applicant from—".

(2) Section 58A(2) is amended by omitting all the words before paragraph (a) and substituting "While an authorisation under section 58(2) remains in force, nothing in section 27, **30, or 30D** prevents an applicant from—".

(3) Section 58A is amended by adding the following subsection:

"(7) Subsections (1) and (2) apply to an authorisation that is given either before or after the Commerce (Cartels and Other Matters) Amendment Act **2011** comes into force."

10 When Commission may grant authorisation

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

10A Procedure for applications for authorisation of restrictive trade practices

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

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

10B Determination of applications for authorisation of restrictive trade practices

(1) Section 61 is amended by inserting the following subsection after subsection (1):

"(1A) If authorisation is not granted within 120 working days after the date on which the application is registered, the Commission is deemed to have declined the application, subject to any alternative timetable agreed between the Commission and the applicant."

(2) Section 61(6) is amended by omitting "or is deemed to result".

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

(1) Section 62 is amended by repealing subsections (3), (4), and (5).

(2) Section 62(6) is amended by omitting “The Commission may, of its own motion, determine to hold a conference in relation to the draft determination and” and substituting “Before determining the application, the Commission may determine to hold a conference and, if so,”.

(3) Section 62(7) is amended by inserting “, if appropriate,” after “and may prepare a single draft determination in relation to the applications and”.

Clearance regime for collaborative activities

12 New sections 65A to 65D inserted

The following sections are inserted after section 65:

“**65A Commission may give clearances relating to cartel provisions ~~Clearances from cartel prohibition for collaborative activity~~**

“(1) A person who proposes to enter into a contract or arrangement, or arrive at an understanding, that contains, or may contain, a cartel provision may apply to the Commission for a clearance under this section.

“(2) The Commission ~~may~~ must give a clearance under this section if it is satisfied that—

“(a) the applicant and any other party to the proposed contract, arrangement, or understanding are or will be involved in a collaborative activity; and

“(b) ~~the~~ every cartel provision in the contract, arrangement, or understanding is reasonably necessary for the purpose of the collaborative activity; and

“(c) ~~the collaborative activity~~ entering into the contract or arrangement, or arriving at the understanding, or giving effect to any provision of the contract, arrangement, or understanding, will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

“(3) For the purpose of **subsection (2)**, it is not necessary for the Commission to determine whether ~~the~~ a particular provision is in fact a cartel provision, ~~provided it is satisfied that the applicant has reasonable grounds for believing that it is or might be~~ providing there are reasonable grounds for believing it might be.

“(4) If clearance is not given within 30 working days after the date on which the application is registered in accordance with section 60(2)(a), the Commission is deemed to have declined to give the clearance, subject to any alternative timetable agreed between the Commission and the person applying for clearance.

“65B Effect of clearance under section 65A

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

“(a) a party to the contract, arrangement, or understanding to which the clearance relates does not contravene section 27 or **30** by entering into the contract or arrangement, or arriving at the understanding; and

“(b) a person does not contravene section 27 or **30** by giving effect to any cartel provision in the contract, arrangement, or understanding to which the clearance relates; and

“(c) **section 30D(1)** does not apply to any cartel provision in the contract, arrangement, or understanding.

“65C Procedures relating to clearances

“(1) Section 60 (except subsections (2)(c) and (3)) applies to an application for a clearance under **section 65A** in the same way as it applies to an application for an authorisation made under section 58.

“(2) Every clearance given under **section 65A** must be given by way of written notice to the applicant.

“65D Revocation of clearances

~~“(1) The Commission may revoke a clearance given under **section 65A** if it is satisfied that the clearance was given on information that was false or misleading in a material particular.~~

"(1) The Commission may revoke a clearance given under **section 65A** if it is satisfied that—

"(a) the clearance was given on information that was false or misleading in a material particular; or

"(b) there has been a material change of circumstances.

"(2) The Commission must not revoke a clearance unless the person to whom the clearance was given, and any other person who in the opinion of the Commission is likely to have an interest in the matter, is given a reasonable opportunity to make submissions to the Commission and the Commission has had regard to those submissions."

Amendment relating to clearance for business acquisitions

13 Commission may give clearances for business acquisitions

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

Lay members of High Court

13A Lay members of High Court in certain cases

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

(2) Section 78(4)(b) is repealed.

Pecuniary penalties generally

13B Relationship between pecuniary penalties and criminal liability

(1) Section 79B(1) is amended by omitting "section 86B or 87B" and substituting "any provision of this Part".

(2) Section 79B(2) is amended by omitting "section 86B or 87B" and substituting "any provision of this Part".

(3) Section 79B is amended by adding the following subsection:

“(3) Any uncompleted proceedings for an order under this Act that a person pay a pecuniary penalty must be stayed if criminal proceedings are started or have already been started against the person for the same act or omission, or substantially the same act or omission, in respect of which the pecuniary penalty order is sought.”

Amendments relating to penalties for cartels

14 Pecuniary penalties

(1) The heading to section 80 is amended by adding “**relating to restrictive trade practices**”.

(2) Section 80(2B) is amended by repealing paragraph (b) and substituting the following paragraph:

“(b) in any other case, the greater of the following:

“(i) $10 million:

“(ii) either,—

“(A) if it can be readily ascertained and if the court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or

“(B) if the commercial gain cannot readily be ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred.”

(3) Section 80 is amended by inserting the following subsection after subsection (2B):

“(2C) In proceedings relating to a contravention of **section 30**, if the defendant claims that an exemption in **section 31, 32, or 33** applies, it is for the defendant to prove, on the balance of probabilities, that the relevant exemption applies.”

~~**15 Body corporate not to indemnify certain persons in respect of pecuniary penalties**~~

~~(1) Section 80A is amended by omitting the heading and substituting the following heading: "**No indemnity for pecuniary penalties relating to cartels**".~~

~~(2) Section 80A is amended by repealing subsection (1) and substituting the following subsection:~~

~~"(1) A person, not being an individual, must not indemnify any director, employee, or agent, or former director, employee, or agent, of the person or any of its interconnected bodies corporate in respect of—~~

~~"(a) liability for payment of a pecuniary penalty under section 80 that arises out of a contravention of **section 30**; or~~

~~"(b) costs incurred by the director, employee, or agent, or former director, employee, or agent, in defending or settling any proceeding relating to that liability."~~

~~(3) Section 80A(3) is amended by repealing the definitions of **agent**, **director**, and **servant**.~~

15 New section 80A substituted

Section 80A is repealed and the following section substituted:

"80A Restriction on indemnities relating to contraventions of section 30

"(1) A body corporate must not indemnify any director, employee, or agent, or former director, employee, or agent, of the body corporate or of any of its interconnected bodies corporate (**person A**) in respect of—

"(a) any pecuniary penalty imposed on person A by the court under section 80 in respect of a contravention of **section 30**; or

"(b) any penalty imposed on person A by the court following the conviction of person A under **section 82B**; or

"(c) any costs incurred by person A in defending any civil proceedings in which the pecuniary penalty referred to in **paragraph (a)** is imposed or any criminal proceedings in which person A is convicted as described in **paragraph (b)**.

“(2) An indemnity given in contravention of **subsection (1)** is void.

“(3) In this section, **indemnify** includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning.”

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

(1) Section 80C is amended by omitting “that—” and substituting “that the person has, in contravention of **section 30**,—”.

(2) Section 80C is amended by repealing paragraphs (a) ~~and (b)~~ to (d) and substituting the following paragraphs:

~~“(a) the person has, in contravention of **section 30**,—~~

~~“(i) entered into a contract or arrangement, or has arrived at an understanding, that contains a cartel provision; or~~

~~“(ii) given effect to a contract, arrangement, or understanding that contains a cartel provision:~~

“(a) entered into a contract or arrangement, or has arrived at an understanding, that contains a cartel provision; or

“(b) given effect to a contract, arrangement, or understanding that contains a cartel provision.”

17 Exemplary damages for contravention of Part 2

Section 82A is amended by adding the following subsection:

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

18 New section 82B inserted

The following section is inserted after section 82A:

“82B Offence relating to cartel prohibition

“(1) A person commits an offence if—

“(a) the person,—

“(i) in contravention of **section 30**, enters into a contract or arrangement, or arrives at an understanding, that contains a cartel provision; and “(ii) intends, at that time, to engage in price fixing, restricting output, or market allocating~~, or bid rigging~~ (as those terms are defined in **section 30A**); or

“(b) the person,—

“(i) in contravention of **section 30**, gives effect to a contract, arrangement, or understanding that contains a cartel provision; and

“(ii) intends, at the time the contract, arrangement, or understanding is given effect to, to engage in price fixing, restricting output, or market allocating~~, or bid rigging~~ (as those terms are defined in **section 30A**).

~~“(2) In a prosecution under this section, it is a defence if the defendant honestly believed at the relevant time that an exemption in **section 31, 32, or 33** applied.~~

“(2) In a prosecution under this section, it is a defence, for a defendant involved in a collaborative activity, if—

“(a) the defendant honestly believed that the cartel provision was reasonably necessary for the purposes of the collaborative activity; and

“(b) that belief existed at the time the defendant entered into or arrived at the contract, arrangement, or understanding that contained the cartel provision, or at the time the defendant gave effect to the cartel provision, as the case requires.

“(3) A defendant that wishes to claim that an exemption in **section 31, 32, or 33** applies, or to rely on the defence in **subsection (2)**, must—

“(a) notify the prosecution of that fact within 1 month after the date on which the defendant is committed for trial for the offence; and

“(b) at the same time, provide sufficient details about the application of the relevant section to fully and fairly inform the prosecution of the manner in which the exemption or defence is claimed to apply.

“(4) An individual who commits an offence against this section is liable on conviction on indictment to imprisonment for a term not exceeding 7 years.

"(5) A person, not being an individual, that commits an offence against this section is liable on conviction on indictment to a fine of the greater of the following:

"(a) $10 million:

"(b) either,—

"(i) if it can be readily ascertained and if the court is satisfied that the offence occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or

"(ii) if the commercial gain cannot be readily ascertained, 10% of the turnover of the person and all its interconnected bodies corporate (if any) in each accounting period in which the contravention occurred."

Amendment relating to acquisitions by overseas persons

19 Pecuniary penalties

(1) The heading to section 83 is amended by adding "**relating to business acquisitions**".

(2) Section 83 is amended by repealing subsection (1) and substituting the following subsections:

"(1) The court may, on the application of the Commission, order a person to pay a pecuniary penalty to the Crown if the court is satisfied that the person—

"(a) has contravened section 47 or **47B**; or

"(b) has attempted to contravene either of those sections; or

"(c) has aided, abetted, counselled, or procured any other person to contravene either of those sections; or

"(d) has induced, or attempted to induce, any other person, whether by threats or promises or otherwise, to contravene either of those sections; or

"(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by any other person of either of those sections; or

"(f) has conspired with any other person to contravene either of those sections.

"(1A) The amount of pecuniary penalty must not, in respect of each act or omission, exceed $500,000 in the case of an individual, or $5 million in any other case."

Attributing conduct

20 New section 90 substituted

Section 90 is repealed and the following section substituted:

"90 Conduct by employees, agents, and others

"(1) In proceedings under this Part in respect of conduct engaged in by a person other than an individual (**person A**), if it is necessary to establish the state of mind of person A it is sufficient to show that a director, employee, or agent of person A, acting within the scope of the director's, employee's, or agent's actual or apparent authority, had that state of mind.

"(2) Conduct by a person (**person B**) is deemed for the purposes of this Act also to be the conduct of a person other than an individual (**person A**) if, at the time of the conduct,—

"(a) person B was a director, employee, or agent of person A, acting within the scope of person B's actual or apparent authority; or

"(b) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of a director, employee, or agent of person A who was acting within the scope of the director's, employee's, or agent's actual or ~~actual or~~ apparent authority.

"(3) In civil proceedings under this Part in respect of conduct engaged in by an individual (**person C**), if it is necessary to establish the state of mind of person C it is sufficient to show that an employee or agent of person C, acting within the scope of the employee's or agent's actual or apparent authority, had that state of mind.

"(4) ~~Conduct~~ In civil proceedings under this Part, conduct by a person (**person B**) is deemed for the purposes of this Act also to be the conduct of an individual (**person C**) if, at the time of the conduct,—

"(a) person B was acting at the direction, or with the consent or agreement (express or implied), of person C; or “(b) person B was an employee or agent of person C and acting within the scope of person B’s actual or apparent authority; or

“(c) person B was a person who was acting on the direction, or with the consent or agreement (express or implied), of an employee or agent of person C who was acting within the scope of the employee’s or agent’s actual or apparent authority.

“(5) A reference in this section to the state of mind of a person includes a reference to—

“(a) the knowledge, intention, opinion, belief, or purpose of the person and the person’s reasons for that intention, opinion, belief, or purpose; and

“(b) the state of mind of a person outside New Zealand.”

Appeals relating to authorisations and clearances

21 Persons entitled to appeal

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

“(a) in the case of an appeal against a determination of the Commission in relation to an application for an authorisation under section 58 or 67, the applicant and any other person who—

“(i) has a direct and significant interest in the application; and

“(ii) participated in the Commission’s processes leading up to the determination:”.

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

“(c) in the case of an appeal against a determination of the Commission under section 66 in relation to a notice seeking a clearance,—

“(i) the person who sought the clearance; and

“(ii) any person whose assets, or the shares in which, are proposed to be acquired pursuant to the clearance:”.

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

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

"(i) the person who applied for the clearance; and

"(ii) any other person who is a party to the contract, arrangement, or understanding to which the application for clearance relates:".

Increasing penalties

22 Offences

(1) Section 103 is amended by repealing subsection (4) and substituting the following subsection:

"(4) A person who contravenes subsection (1), (2), or (3) commits an offence and is liable on summary conviction to,—

"(a) in the case of an individual, a fine not exceeding $100,000:

"(b) in any other case, a fine not exceeding $300,000."

(2) Section 103(5) is amended by omitting "6 months" and substituting "3 years".

Part 2
~~Consequential and minor amendments~~
Other amendments and transitional provision

23 Consequential and minor amendments to principal Act

(1) The principal Act is amended as set out in the **Schedule**.

(2) By way of explanation—

(a) the amendments in **Part 1 of the Schedule** are consequential on the amendments made in **Part 1** of this Act; and

(b) the amendments made in **Part 2 of the Schedule** adjust wording in sections that are otherwise not amended by this Act, in order to align the wording with that used in sections that are amended; and

(c) the amendments made in **Part 3 of the Schedule** update references to the Trade Practices Act 1974, an Act of the Commonwealth of Australia, because the name of that Act is now the Competition and Consumer Act 2010.

23A Amendments to Shipping Act 1987

(1) This section amends the Shipping Act 1987.

(2) In section 2, repeal the definitions of **direction** and **unfair practice**.

(3) Repeal Parts 1 and 3.

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

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

23C Transitional provision relating to amendments to Shipping Act 1987

(1) At any time before **section 23A** of this Act comes into force, any carrier (as defined in section 2 of the Shipping Act 1987) who is a party to a contract, arrangement, or understanding, or to a proposed contract, arrangement, or understanding, may apply to the Commerce Commission for the following:

(a) an authorisation under section 58 of the Commerce Act 1986, in which case the Commission may grant the authorisation in accordance with that section:

(b) a clearance under **section 65A**, in which case the Commission may grant the clearance in accordance with that section, except that the clearance may be granted in respect of a contract, arrangement, or understanding that has already been entered into or arrived at (and not just in relation to proposed contracts, arrangements, or understandings).

(2) However, **subsection (1)** applies only to a contract, arrangement, or understanding so far as it contains a provision exclusively for the carriage of goods by sea from a place in New Zealand to a place outside New Zealand, or from a place outside New Zealand to a place in New Zealand.

(3) To avoid doubt, a provision that relates to the carriage of goods to or from a ship, or to the loading or unloading of a ship, is not a provision of the sort described in **subsection (2)**.

(4) This section is repealed at the close of the day immediately before **section 23A** comes into force.

(5) Despite the repeal of this section, any application made pursuant to **subsection (1)** before its repeal may continue to be dealt with by the Commission as if the section had not been repealed.

24 Consequential amendment to District Courts Act 1947

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

"*Part N—Commerce Act 1986*

Section	Offence
Section 82B	Offence relating to cartel provisions

25 Consequential amendment to Civil Aviation Act 1990

Section 91(1) of the Civil Aviation Act 1990 is amended by omitting "sections 27 to 29" and substituting "~~section 27 or 28~~ sections 27 to **30**".

Schedule

s 23

Consequential and minor amendments to principal Act

Part 1

Section 58

Subsection (5): repeal.

Subsection (6): repeal.

Section 59

Subsection (1)(a): omit "or section 29".

~~Subsection (2)(a): omit "or section 29".~~

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

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

Section 61

Subsection (7): repeal.

Section 75(1)(a)

Add:

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

~~**Section 78(1)**~~

~~Omit "sections 27 to 29, 36, 36A, 37, 38, or 47" and substitute "sections 27, 28, 36, 36A, 37, 38, 47, or **47B**".~~

~~**Section 79B**~~

~~Subsection (1): omit "section 86B or 87B" and substitute "this Part".~~

~~Subsection (2): omit "section 86B or 87B" and substitute "this Part".~~

~~**Section 85**~~

~~Heading: omit "**Part 3**" and substitute "**section 47**".~~

Part 1—*continued*

<u>Heading to section 85</u>

<u>Omit "**Part 3**" and substitute "**section 47**".</u>

Part 2

Section 80B(1)

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

Section 86(3)

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

Section 86B(2)

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

Section 87(3)

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

Section 87B(2)

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

Section 99A(3)

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

Part 3

Section 6A(b)

Omit "Trade Practices Act 1974" and substitute "Competition and Consumer Act 2010".

Part 3—*continued*

Section 6B

Omit "Trade Practices Act 1974" and substitute "Competition and Consumer Act 2010".

Section 6C

Omit "Trade Practices Act 1974" and substitute "Competition and Consumer Act 2010".

Section 98H(2)

Omit "Trade Practices Act 1974" and substitute "Competition and Consumer Act 2010".

Section 99A(1)

Omit "Trade Practices Act 1974" and substitute "Competition and Consumer Act 2010".

Legislative history

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