Legislative statement for the Commerce (Promoting Competition and Other Matters) Amendment Bill – First Reading

Presented to the House of Representatives in accordance with Standing Order 272

Overview

The Commerce (Promoting Competition and Other Matters) Amendment Bill (**the Bill**) amends the Commerce Act 1986 (**the Act**) to modernise New Zealand's competition settings. Currently, businesses face high compliance costs for pro-competitive collaboration, enforcement tools can be slow or inflexible, and merger rules need to better capture patterns of consolidation that harm competition.

The Bill's objective is to ensure competition law is fit for purpose - providing clearer processes, more effective oversight of mergers, and targeted remedies to protect and promote competition. It introduces:

- a statutory notification regime for specified conduct that is likely to be in the public interest or is unlikely to substantially lessen competition, and a new class-exemption power;
- more effective oversight of mergers, including powers to suspend transactions and require applications for clearance, clarified tests, and new statutory timeframes;
- a new court remedy – corrective action orders – to avoid, remedy or mitigate the actual or likely effects arising from a contravention of Part 2 of the Act;
- updated confidentiality protections, including a time-limited restriction on the Commerce Commission (**Commission**) disclosing confidential information under the Official Information Act 1982 (**OIA**); and
- an objective economic test for predatory pricing.

Beneficial collaboration

The Bill creates a statutory notification regime for the types of conduct listed in Schedule 8. A person proposing to engage in such conduct can notify the Commission, and the Commission then has 45 working days to object on the grounds set out in Schedule 8. If the Commission does not object, the notified conduct is protected for a time-limited period and is treated, for the duration of that period, as if authorised against the specified provisions of the Act. The Commission may impose conditions and may rescind a no-objection in specified circumstances.

Schedule 8 lists the following conduct as notifiable for the purposes of the statutory notification regime:

- Collective bargaining (with a monetary threshold for expected contract values and a maximum protected period); and
- Resale price maintenance.

The Bill provides for types of notifiable conduct to be added, amended or removed by Order in Council on the recommendation of the Minister of Commerce and Consumer Affairs, following consultation with the Commission.

New section 65R enables the Commission to make class exemptions to proactively exempt classes of conduct from any provision(s) in Parts 2 or 3 where the conduct is either unlikely to lessen competition or is likely to result in public benefits that outweigh the detriments. Exemptions are time-limited (up to 10 years), may include limitations or conditions, and are disallowable instruments. This creates a proactive tool to reduce compliance costs for low-risk conduct while retaining Parliamentary oversight.

Merger oversight

The Bill clarifies that a substantial lessening of competition (**SLC**) may include creating, strengthening, or entrenching a substantial degree of power in a market (new section 3(2A)). It also permits consideration of the combined effects of serial acquisitions by interconnected or associated parties over a three-year period (new sections 3(8)–(10)). These changes will make it easier for the Commission to assess “creeping” acquisitions and “killer” acquisitions.

New section 47E empowers the Commission to suspend an acquisition (or proposed acquisition) for up to 40 working days if necessary to protect competition while assessing a potential breach of section 47. New section 47F empowers the Commission to require parties to seek clearance where there are reasonable grounds to believe the acquisition could breach section 47.

New sections 66(3A) and 67(3A) introduce new statutory timeframes to give businesses greater certainty about merger reviews. For clearances, the Commission must make its decision within 140 working days, and for authorisations, within 160 working days. Rolling 20-day extensions are permitted for defined circumstances, such as complexity, conferences, undertakings, or material changes.

A new provision allows the clock for clearance or authorisation decisions to be suspended where information is outstanding from third parties, or a related acquisition is being considered by an overseas regulator (section 68A). To reinforce transparency and timeliness, the Bill requires a summary of reasons for the clearance or authorisation decision to be published within one working day and a full statement of reasons within 20 working days (section 68(1A)).

The Bill empowers the Commission to accept behavioural undertakings (in addition to structural undertakings) when giving a clearance or authorisation, subject to safeguards (section 69A amended). This provides flexibility to address competition issues in markets where behavioural commitments (for example, around access, non-discrimination, interoperability, or data handling) can be more effective or proportionate than structural remedies, while ensuring enforceability.

New market study power

The Bill introduces a new power for the Commission to carry out a study in relation to any markets, industries, and sectors to assess whether pro-competition regulation is needed and to recommend options to the Minister (new section 51F). This will help ensure that any future regulatory interventions are evidence-based and targeted. For example, the Commission may recommend regulation to break down barriers to entry or expansion across sectors. This power will allow the Commission to study and assess regulatory solutions where structural impediments to competition persist.

Corrective action orders

Where the court finds a contravention of Part 2 (restrictive trade practices), new section 82F enables the court to order specific steps to avoid, remedy, or mitigate adverse effects, such as:

- providing goods, services, or information for supply;
- using a specified methodology, protocol or standard;
- acting non-discriminatorily toward defined classes of trading partners;
- reflecting specified terms in contracts.

The court may appoint a monitor, provide for dispute resolution, and set conditions. This provision is intended to provide a flexible mechanism for remedying or mitigating the likely effects arising from the contravention, especially where non-price barriers (such as access or technical constraints) entrench dominance.

Confidentiality framework

The Bill updates section 100 to broaden the scope of the confidentiality orders the Commission may issue, including during investigations and merger reviews. Specifically:

- orders may remain in force for up to 10 years from conclusion of the investigation or inquiry;
- breach of an order, without reasonable excuse, is an offence, with updated penalties (up to $100,000 for an individual and $300,000 for a body corporate).

New section 100AA provides a 10-year restriction on the Commission publishing or disclosing confidential information supplied in confidence, including under the OIA, unless one of the narrowly framed grounds applies (such as providing the information in statistical or summary form; proper interest recipients; cooperation arrangements; consent; or use in performing statutory functions). The Commission may extend this period beyond 10 years only where disclosure may cause harm to the supplier or subject of the information, and not beyond the point at which records must be transferred under the Public Records Act 2005.

This model is aligned with frameworks used by other financial regulators, namely the Reserve Bank of New Zealand and the Financial Markets Authority. This model balances transparency, the OIA's purposes, and the public interest in effective enforcement.

The reforms also strengthen protections for those who assist the Commission. New sections 97A and 97B prohibit retaliation by employers and victimisation against individuals who make complaints or provide information. Retaliation by an employer is treated as a personal grievance under the Employment Relations Act 2000, ensuring access to remedies. These measures complement the Protected Disclosures (Protection of Whistleblowers) Act 2022 and help create a safe environment for cooperation.

Predatory pricing

New section 36C introduces an objective test for predatory pricing by a firm with a substantial degree of market power:

- sustained pricing below Average Variable Cost (AVC) or Average Avoidable Cost (AAC) is treated as having the purpose or effect of substantially lessening competition;

- sustained pricing above AVC or AAC but below Long-run Average Incremental Cost or Average Total Cost is treated as having the purpose or effect of substantially lessening competition if the pricing is for an exclusionary purpose;
- recoupment of losses is not required (but may be considered);
- short-term promotions, incorrect pricing, and one-off specials are excluded, absent a pattern of behaviour.

This provides clarity for businesses and enforcers, distinguishing vigorous competition from exclusionary conduct.

Consequential and related amendments

The Bill updates definitional provisions (e.g., broader definition of assets; alignment of incorporation by reference to the Legislation Act 2019 approach), clarifies information-gathering powers (including reproduction of electronic information in usable form and search of a "thing"), and updates cooperation provisions to support multilateral arrangements with overseas regulators.