

18 February 2021

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Commerce Amendment Bill

Purpose

1. We have considered whether the Commerce Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 2191/7.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 25 (minimum standards of criminal procedure). Our analysis is set out below.

The Bill

4. The Bill amends the Commerce Act 1986 (the Act) to:
 - a. amend s 36 of the Act to prohibit firms with a substantial degree of power in a market from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market;
 - b. enable authorisations from the Commerce Commission (the Commission) to be available for conduct that may breach s 36 of the Act, but which is ultimately in the public interest;
 - c. repeal the safe harbours for intellectual property in ss 45, 36(3), and 7(2) of the Act, and in s 7(3) to the extent that it relates to intellectual property;
 - d. prohibit covenants that create or implement a cartel, in the same way as contracts;
 - e. clarify that the Act's provisions relating to anti-competitive conduct apply to interests in land, without substantively extending the Act's scope;
 - f. increase the maximum pecuniary penalties for anti-competitive mergers to align with those relating to anti-competitive agreements in s 80 of the Act;
 - g. increase the maximum number of Commerce Commission members from six to eight; and
 - h. provide that the Commerce Commission may share information that it holds in relation to its functions under the Act, or any other Act that it enforces, with other

government agencies or regulators, subject to safeguards relating to that use and storage of that information.

Consistency of the Bill with the Bill of Rights Act

Section 25 – Minimum standards of criminal procedure

5. Section 25 provides that everyone who is charged with an offence is entitled to the minimum standards of criminal procedure. This includes the right to a fair and public hearing by an independent and impartial court (s 25(a)), and the right not to be compelled to be a witness or to confess guilt (s 25(d)).
6. The Bill of Rights Act does not include a direct reference to a general right against self-incrimination, containing direct references only to a more limited right to silence for those arrested or detained (s 23(4)) as well as s 25(d) above. However, leading commentators appear to agree that the right of a person not to be compelled to incriminate themselves in advance of a hearing, which exists in the common law and pre-dates the Bill of Rights, is broader and should be read into s 25(d) and/or other provisions of the Bill of Rights Act.¹
7. The Commission may require a person to supply information or documents or appear to give evidence for the purpose of carrying out its functions and exercising its powers under the Act.² Clause 34 of the Bill newly enables the Commission to share any information and documents it obtains with public service agencies and statutory entities, including law enforcement and other regulatory agencies, to use for their own functions. This has the potential to engage the right against self-incrimination under the Bill of Rights Act, as information and evidence obtained by the Commission could be passed to other agencies for use in criminal proceedings against the person who was compelled to provide that information.
8. However, where a provision limits a right affirmed in the Bill of Rights Act, this limit may be reasonably justified in terms of s 5 of the Bill of Rights Act. The s 5 inquiry asks if the limit serves an sufficiently important objective to justify limiting the right; and if so whether the limit is rationally connected to achieving that objective, proportionate to the importance of the objective, and limits the right no more than is reasonably necessary to achieve that objective.³
9. The provisions that enable the Commission to share information with other public sector agencies are rationally connected to improving cross-government cooperation in preventing anti-competitive behaviour. We consider this to be an important objective.

¹ See Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [23.16.8], referring to s 25(a) of the Bill of Rights Act; and Paul Rishworth “The Right to Silence and the Right Against Self-Incrimination” in Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) 646 at 648, which refers instead to the right to natural justice under s 27(1).

² Section 98 of the Act. Under s 106(4) the person may not refuse such a request on the grounds that it might incriminate them.

³ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [123].

10. Additionally, we consider that there are adequate existing safeguards in the Act to protect the right against self-incrimination in this case. These ensure that the limitation on the right is proportionate and limits the right no more than is reasonably necessary. Section 106(5) of the Act provides the protection that a statement made by a person to the Commission is not admissible against that person in criminal proceedings or proceedings for pecuniary penalties. This protection is not limited to the Commission and would apply to criminal proceedings brought by other agencies. While the protection extends only to answers given by a person and not pre-existing documents produced in response to a request, we consider there is a greater expectation in a commercial regulatory environment that a person operating within that environment may need to account for their activities and produce documentation which may then be relied on if they disclose offences.⁴
11. For these reasons, we consider that any limits placed by the Bill on a broader right against self-incrimination are justified under s 5 of the Bill of Rights Act.

Conclusion

12. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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⁴ Overseas cases on this topic are discussed in *Butler and Butler*, above n 1, from [23.16.22].