

15 March 2018

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 19876/9.0). 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 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Commerce Act 1986 ('the principal Act'). It:
 - a. empowers the Commerce Commission ('the Commission') to undertake competition studies in respect of markets that may not be functioning well, either at its own initiative or on the direction of the Minister of Commerce and Consumer Affairs ('the Minister');
 - b. amends Part 4 of the principal Act, which regulates New Zealand's major international airports, to ensure the regime's processes remain fit for purpose;
 - c. establishes an enforceable undertakings regime, to enable negotiated settlements in relation to breaches of the principal Act to be immediately and effectively enforced; and
 - d. repeals the principal Act's 'cease-and-desist' regime, as it is rarely used and confers no practical advantage over the court-based, injunction approach.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

5. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions

of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹

Competition studies

6. The Bill inserts new Part 3A into the principal Act, which empowers the Commission to undertake studies into the competition conditions relating to goods or services in a particular sector, either at its own initiative or under a direction from the Minister. Competition studies, also known as ‘market studies,’ are intended to enable promotion, rather than just protection, of competition as a stimulator of increased efficiency, innovation, and consumer welfare. Currently, Part 4 of the principal Act only permits the Commission to investigate markets in which there is little or no competition, with a view to assessing whether economic regulation is required.
7. A ‘competition study’ is defined in new s 48 as “a study of any factors that may affect competition for the supply or acquisition of goods or services.” The Bill provides that a competition study will be initiated only where it is in the public interest. Competition studies are intended to provide an insight into markets that may not be functioning optimally, even where no breaches of the principal Act are apparent. The results and recommendations of competition studies will be available to the public, and can be used by the Government to determine whether and what kind of further regulatory intervention is needed.
8. Section 98 of the principal Act gives the Commission wide-ranging powers to require documents, evidence, or other written and oral information from any person. These powers can be exercised only if the Commission considers it necessary for the purposes of carrying out its functions and exercising its powers under the principal Act. It is an offence to refuse or fail to comply with a notice requiring information under s 98.
9. In undertaking competition studies, the Commission will use these existing information-gathering powers. New s 49 expands their application by providing that carrying out a competition study, and preparing a competition report, are functions of the Commission. The expansion of the Commission’s information-gathering powers, to assist in its new competition study function, constitutes a prima facie limit on the freedom of expression.
8. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:²
 - a. does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?

¹ *RJR-MacDonald Inc. v Canada (Attorney General)* 1995 3 SCR 199.

² *Hansen v R* [2007] NZSC 7 [123].

10. Competition studies are an important tool for competition authorities to gain an understanding of markets that may appear to be functioning sub-optimally, and ultimately to the detriment of consumers and the efficiency of the economy as a whole. They can lead to the identification of factors that are preventing, restricting or distorting competition, efficiency or consumer welfare in a market. Competition studies are widely recognised among OECD jurisdictions as an important tool to support the effectiveness of competition authorities, and we understand their absence is out-of-step with international practice in relation to competition regimes. We therefore consider the provision of a competition studies regime is a sufficiently important objective to justify some limitation on the freedom of expression.
11. The limitation on freedom of expression is rationally connected with this objective because, in order to conduct competition studies effectively, it is essential that researchers have access to relevant information about a market.
12. The freedom of expression is impaired no more than reasonably necessary, and is in due proportion to the importance of the objective. As discussed above, the existing information-gathering powers may be exercised only if the Commission considers it necessary for the purposes of carrying out its functions and exercising its powers. We note further that there may be disincentives for market participants to voluntarily provide information for the purposes of contributing to competition studies, as those studies may ultimately lead to heightened regulation of a particular industry.
13. We therefore consider that the limit on the freedom of expression, imposed by the extension of the Commission's information-gathering powers for the purposes of competition studies, is justified under the Bill of Rights Act.

Airport Services

14. The Bill also seeks to strengthen the regulatory regime for airports. The Bill replaces the existing Subpart 11 in Part 4 of the principal Act, which provides for the regulation of specified airport services, with a more comprehensive new Subpart 11 that includes a process for imposing additional regulation if existing regulation is found to be ineffective.
15. New Subpart 11 includes new s 56C, which essentially re-enacts the existing s 56C in the principal Act. It provides that specified airports (Auckland, Wellington and Christchurch international airports) are subject to information disclosure regulation. Information disclosure regulation, as set out in Subpart 4 of Part 4 of the principal Act, requires those specified airports to disclose to the Commission, and to the wider public, commercial information such as financial statements, asset valuations, prices and pricing methodologies, contracts, and forecasts.³ The purpose of this regulation is to ensure that sufficient information is readily available to assess whether the market is operating to promote the long-term benefit of consumers.⁴
16. New s 56C constitutes a prima facie limitation on the freedom of expression by compelling the collection and publication of certain kinds of commercial information. While it effectively re-enacts an existing provision of the principal Act, for the purposes of this advice we have considered afresh whether the limitation is justified under s 5 of the Bill of Rights Act.

³ Commerce Act 1986, s 53C(2).

⁴ Commerce Act 1986, s 53A, s 52A.

17. We consider it is so justified, for substantially the same reasons discussed above in relation to competition studies. For the regulatory regime to operate effectively for the benefit of consumers and economic efficiency more generally, competition authorities and the public must have access to the kinds of commercial information subject to the information disclosure requirements, in relation to the specified airports that effectively operate as monopolies or near-monopolies.
18. We therefore consider that the limit on the freedom of expression, imposed by new s 56C and the information disclosure requirements, is justified under the Bill of Rights Act.

Conclusion

19. 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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