

Commerce Amendment Bill

3 March 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: COMMERCE AMENDMENT BILL

1. We have considered whether the Commerce Amendment Bill ("the Bill") (PCO 12799/3.6) is consistent with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act"). We understand that the Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday, 6 March 2008.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered potential issues of inconsistency with sections 14, 21, 25(c) and 27 of the Bill of Rights Act. Our analysis of these potential issues is set out below.

OVERVIEW OF THE BILL

3. The Bill seeks to amend Parts 4, 4A, 5 and 6 of the Commerce Act 1986 ("the Act") to promote the long-term interests of consumers in markets where there is little or no competition and no likelihood of a substantial increase in competition (such as those relating to basic infrastructure like electricity lines, gas pipelines and airports). The Bill therefore aims to encourage outcomes that are consistent with competition, and, specifically, ensure that suppliers:
 - have incentives to innovate and invest;
 - have incentives to improve efficiency and provide services at a quality that reflects consumer demands;
 - share the benefits of efficiency gains with consumers; and
 - are limited in their ability to extract excessive profits.
4. Notable initiatives include a new test and processes for determining when regulation may be imposed; a requirement for the Commerce Commission ("the Commission") to set "input methodologies"[\[1\]](#) that will provide greater certainty, transparency and predictability to businesses and their customers; and "fit for purpose" forms of regulation ranging from lighter-handed options (such as information disclosure) to conventional price control. The Bill also provides for a range of associated pecuniary penalties and offences, as well as orders for compensation and injunctions.

SUMMARY OF ADVICE

Section 14: the right to freedom of expression

5. A number of provisions of the Bill enable the Commission to compel the disclosure of information. These provisions aim to ensure that firms that are not bound by the disciplines of competition are instead subject to public scrutiny, or that suppliers are complying with the applicable regulatory requirements. Insofar as these provisions engage the right to freedom of expression (which incorporates the right to say nothing), we have concluded that they constitute justified limitations on that right in terms of section 5 of the Bill of Rights Act.^[2]

Section 21: the right to be secure against unreasonable search and seizure

6. The Bill enables the Commission to require the production of documents, and to obtain a search warrant for the purposes of ascertaining compliance with the applicable regulatory requirements. These powers contribute to the administration and integrity of the regulatory regime. We have concluded that they are each consistent with the right to be secure against unreasonable search and seizure in section 21 of the Bill of Rights Act.

Section 25(c): the right to be presumed innocent until proved guilty

7. Clause 21 of the Bill seeks to make refusal or failure *without reasonable excuse* to comply with specific requests for information an offence under section 103(1)(a) of the Act. Clause 21 gives rise to an issue of inconsistency with section 25(c) because the defendant is required to prove (on the balance of probabilities) an excuse to escape liability. In our view, clause 21 constitutes a justified limitation on the right to be presumed innocent as affirmed by section 25(c) of the Bill of Rights Act. While a person may have good reason for failing to comply with a request for information, those reasons are peculiarly within the realm of the individual's knowledge and it is rational that he or she should be required to provide a reasonable excuse.

Section 27(1): the right to the observance of the principles of natural justice

8. New section 85C of the Bill prevents the Court from taking into account matters that may be relevant to a person's culpability for a contravention of an undertaking when assessing a pecuniary penalty. We have concluded that this section is not inconsistent with the principles of natural justice, as it does not prevent a person from addressing his or her culpability, but rather changes the factors upon which culpability is to be assessed.

Conclusion on consistency of the Bill with the Bill of Rights Act

9. We have concluded that the Bill appears to be consistent with the Bill of Rights Act.

FULLER ANALYSIS: THE BILL OF RIGHTS ISSUES RAISED BY THE BILL

Section 14: the right to freedom of expression

10. 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.
11. The right to freedom of expression has been interpreted as including the right not to be compelled to say certain things or to provide certain information.^[3] The Bill contains several clauses that enable the compelled disclosure of information.

Information disclosure (Part 4, subpart 4)

12. New section 53B (Effect of being subject to information disclosure regulation) provides that every supplier that is subject to information disclosure regulation must publicly disclose information in accordance with a determination of the Commission under new section 52O. While the specific requirements are to be set by the Commission, the information required to be disclosed may (without limitation) include financial statements, projections, assets values and valuation reports, plans, forecasts and contracts (see new section 53C(2)). The Commission would be able to require disclosed information to be verified by statutory declaration (new section 53C(3)), and could require the provision of consolidated information for all businesses (including those relating to unregulated goods or services) undertaken by the regulated supplier (new section 53D).^[4]
13. In our view, it is questionable whether such information is truly "expressive" in nature so as to engage section 14. In any case, the purpose of information disclosure regulation is to ensure that firms that are not bound by the disciplines of competition are instead subject to public scrutiny, making them less likely to abuse their market power by overcharging customers and running down quality. In view of these ends (and the strong connection with the means employed), we would consider such a provision to be a justified limit on the right to freedom of expression.

Monitoring and investigation provisions

14. In addition to the information disclosure provisions, new sections 53N (Monitoring compliance with price-quality paths) and 53ZC (Powers of Commission under this Part) also enable the Commission to require the production of certain information.
15. Under new section 53N, the Commission may (for the purposes of monitoring compliance with a price-quality path) require a supplier to provide:
 - a written statement confirming whether or not the supplier has complied with an applicable price-quality path;^[5]
 - a report on the written statement signed by an auditor;
 - sufficient information to enable the Commission to determine compliance with all applicable price-quality paths; and/or

- a certificate signed by a director of the supplier confirming the truth and accuracy of any information so provided.
16. Under new section 53ZC, the Commission may (for the purposes of carrying out its functions and exercising its powers under new Part 4) by notice in writing:
- require any supplier to prepare and produce forecasts, forward plans and other information in accordance with set methodology;
 - require any supplier or previous supplier it has reason to believe has information or documents relevant to an investigation, audit or inquiry, to produce or supply documents in relation to goods or services, or the prices or operations of the person in respect of those goods or services;
 - require any supplier or previous supplier it has reason to believe has information or documents relevant to an investigation, audit or inquiry, to answer any questions about any matter the Commission has reason to believe may be relevant to the investigation, audit, or inquiry; and/or
 - require the production of an expert opinion.
17. To the extent that these provisions engage the right to freedom of expression in section 14 of the Bill of Rights Act, we consider that they constitute justified limitations on that right. Each contributes to the important objective of administering, and monitoring compliance with, the regulatory regime, and each provision may only be used with specific purposes in mind.
18. While we note that section 106(4) of the Act provides that a person is not excused from compliance with requirements to provide information on the basis that to do so might tend to incriminate that person, statements made in response to compulsory questions will be inadmissible in proceedings for pecuniary penalties or criminal proceedings (other than for perjury and offences under section 103 of the Act, which insofar as relevant to statements made in response to questions put by the Commission relate to refusing or failing to comply, and misleading the Commission).[\[6\]](#)

Section 21: the right to be secure against unreasonable search and seizure

19. Section 21 of the Bill of Rights Act provides:

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

20. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a "search or seizure". Secondly, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are "unreasonable" in the circumstances.
21. A number of provisions of the Bill already canvassed confer powers of search and seizure that also require scrutiny for compliance with section 21.

New sections 53B, 53N and 53ZC

22. As mentioned above, new section 53B sets out the requirements of information disclosure regulation. In addition to requiring the public disclosure of certain information, new section 53B(1)(c) provides that a supplier must supply the Commission with any further statements, reports, agreements, or particulars requested for the purpose of monitoring the supplier's compliance with the information disclosure requirements.
23. Similarly, new section 53N(c) of the Bill enables the Commission to require the provision of sufficient information to enable it to determine whether a supplier has complied with all applicable price-quality paths.
24. New section 53ZC(1)(e)(i) also enables the Commission (for the purposes of exercising its functions and powers under new Part 4) to require any supplier or previous supplier it has reason to believe has information or documents relevant to an investigation, audit or inquiry, to produce or supply documents in relation to goods or services, or the prices or operations of the person in respect of those goods or services.
25. Clause 21 of the Bill would make refusal or failure (without reasonable excuse) to comply with sections 53B(1)(c), 53N or 53ZC an offence under section 103(1)(a) of the Act punishable upon summary conviction by way of fine not exceeding \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.
26. A requirement to produce documents under statutory authority is likely to constitute a search for the purposes of section 21 of the Bill of Rights Act, especially where failure to provide the documents results in possible sanction.^[7] Accordingly, the Commission's powers to require disclosure under these sections must be exercised reasonably. However, the powers must also be reasonable in themselves.
27. In this regard, we consider that new sections 53B(1)(c), 53N(c) and 53ZC(1)(e)(i) are reasonable, and therefore consistent with section 21. This is because:
 - each contributes to the important objective of administering, and/or monitoring compliance with, the regulatory regime, and each provision may only be used with specifically defined purposes in mind;
 - the production of documents is less of an intrusion into a person's expectation of privacy than a power of entry;^[8] and
 - a regulated supplier in an uncompetitive marketplace has less of an expectation of privacy than an ordinary citizen.

Clause 20 – Power to search

28. Clause 20 of the Bill seeks to amend section 98A of the Act, which provides for a warranted search power. The purpose of the amendment is to confirm that section 98A applies not only in respect of suspected contraventions of the Act, but also in respect of suspected contraventions of any regulatory requirements imposed by the Commission *under* the Act.
29. Accordingly, a suspected breach of an information disclosure requirement set by the Commission under new section 52O, for example, would be sufficient to engage section 98A.

30. We consider that clause 20 is reasonable, and therefore consistent with section 21 of the Bill of Rights Act. In reaching this conclusion, we have noted that:

- the integrity of the regulatory regime is dependent upon the Commission being able to effectively gather evidence of non-compliance;
- a person appointed by the Commission to conduct a search may only do so with the prior authorisation of a District Court Judge, Justice, Community Magistrate, or Court Registrar (not being a constable) – section 98A(2);
- in issuing a search warrant, the District Court Judge, Justice, Community Magistrate, or Court Registrar must be satisfied that there are reasonable grounds to believe that it is necessary for the purpose of ascertaining whether or not a person has engaged in or is engaging in conduct that constitutes or may constitute a contravention of the Act (including the regulatory requirements); and
- the Act contains a number of safeguards such as clear parameters on the powers conferred by a search warrant and the powers granted to persons called to assist (section 98B); the requirement for the person executing the warrant to produce evidence of authority and evidence of identity (section 98C); and the requirement to produce an inventory of items seized (section 98D).

Section 25(c): the right to be presumed innocent until proved guilty

31. Section 25(c) of the Bill of Rights Act provides:

Everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.

32. Section 25(c) protects the right of an individual not to be convicted where reasonable doubt as to his or her guilt exists, meaning the prosecution must prove beyond reasonable doubt that the defendant is guilty. Strict liability offences give rise to an issue of inconsistency with section 25(c) because the defendant is required to prove (on the balance of probabilities) an excuse to escape liability; whereas in other criminal proceedings a defendant must merely raise a defence in an effort to create reasonable doubt. Where a defendant is unable to prove an excuse, then he or she could be convicted even though reasonable doubt exists as to his or her guilt.

33. As mentioned above, clause 21 of the Bill seeks to make refusal or failure *without reasonable excuse* to comply with new sections 53B(1)(c), 53N and 53ZC an offence under section 103(1)(a) of the Act. In our view, clause 21 constitutes a justified limitation on the right to be presumed innocent as affirmed by section 25(c) of the Bill of Rights Act.

34. In reaching this view, we note that the objective behind the provision is to ensure that the Commission has unobstructed access to information about suppliers. Access to this information will allow the Commission to effectively monitor and enforce suppliers' compliance with the regulatory requirements of new Part 4.

35. The offence has been cast as a strict liability offence because, while a person may have good reason for failing to comply with a request for information, those reasons are peculiarly within the realm of the individual's knowledge. Given that this is a regulatory offence, it is

rational that the defendant be required to prove a reasonable excuse, as the defendant is best placed to adduce evidence as to the reasons for failure to comply.

Section 27(1): the right to the observance of the principles of natural justice

36. We have also given particular consideration to whether new section 85C (Matters Court must not take into account under sections 85A and 85B) is consistent with the right to the observance of the principles of natural justice affirmed by section 27(1) of the Bill of Rights Act. New section 85C seeks to prohibit the Court from taking certain matters into account in determining a person's liability and penalty for the contravention of an undertaking. In particular, the Court would be prohibited from considering whether the undertaking is still necessary or desirable, and the extent to which the contravention may have lessened competition in a market.
37. New section 85C impacts upon the ability of a defendant to make a plea in mitigation, or at least, to have it considered. However, we accept that new section 85C (in combination with the mandatory considerations in new section 85A(4)) is designed to place the focus on the behaviour of the defendant, rather than engaging the Court in competition analysis. It does not prevent a person from addressing his or her culpability, but rather changes the factors upon which culpability is to be assessed. For example, while the court may not assess the appropriateness of the Commission accepting the undertaking in the first place, it must consider the circumstances in which the contravention took place - which will no doubt include reference to any changes beyond the defendant's control, whether the defendant sought a variation of the undertaking, and so forth. Accordingly, we do not consider that new section 85C is inconsistent with the right to the observance of the principles of natural justice.

CONCLUSION

38. Overall, we have concluded that the Bill appears to be consistent with the Bill of Rights Act. In reaching this conclusion, we have given particular emphasis to the purpose of the legislation, and the need to create a workable scheme for the regulation of non-competitive markets.

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1 The term "input methodologies" refers to the rules, processes and requirements relating to regulation, such as how to calculate the cost of capital, value assets, allocate common costs, prepare regulatory accounts and so forth.

2 In applying section 5, the Ministry of Justice has regard to the guidelines set out by the Court of Appeal in *Ministry of Transport (MOT) v Noort* [1992] 3 NZLR 260; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9; and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754; as well as the Supreme Court of Canada's decision in *R v Oakes* [1986] 1 S.C.R. 103.

3 *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

4 Importantly though, such consolidated information may only be required for the purpose of monitoring compliance with information disclosure regulation applying to regulated goods or services (new section 53D(2)). For example, it may be necessary to ensure that common costs are properly allocated.

5 Under new section 53M(1), a "price-quality path" must specify either the maximum price or prices that may be charged by a regulated supplier within a regulated period, or the maximum revenues that may be recovered by a regulated supplier within that period; the quality standards that must be met by the regulated supplier; and the regulatory period.

6 Sections 106(5) and (6) of the Act, to be amended by clause 23 of the Bill.

7 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC); see also *McKinlay Transport Ltd v R* (1990) 68 DLR (4th) 568 (SCC); and *Thomson Newspapers v Canada* [1990] 1 SCR 425.

8 *Trans Rail v Wellington District Court* [2002] 3 NZLR 780, 791-792.

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