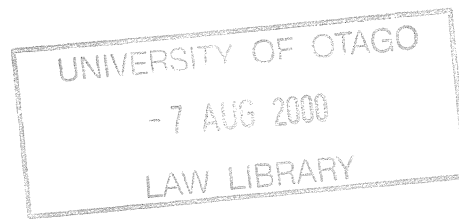


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No 37



House of Representatives

Supplementary Order Paper

Tuesday, 1 August 2000

Commerce Amendment Bill

Proposed amendments

Hon Paul Swain, in Committee, to move the following amendments:

New clauses 1A and 1B

To insert, after clause 1 (line 8 on page 1), the following clauses:

1A Title repealed

The Title of the principal Act is repealed.

1B New section 1A inserted

The principal Act is amended by inserting, after section 1, the following section:

“1A Purpose

The purpose of this Act is to promote the efficient operation of markets through the promotion of competition for the long-term benefit of consumers.”

Clause 2: new subclauses (1) and (2)

To insert, before the expression “Section 2(1)” (line 9 on page 1), as subclauses (1) and (2), the following subclauses:

(1) Section 2(1) of the principal Act is amended by inserting, after the definition of **Commission**, the following definition:

“**Commissioner** means a member of the Commission appointed under **section 9(3A)**”.

(2) Section 2(1) of the principal Act is amended by repealing the definition of **Minister**, and substituting the following definition:

“**Minister** means the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime

Minister, is for the time being responsible for the administration of this Act”.

Clause 3 and new clause 3A

To omit clause 3 (which appears on pages 2 and 3), and substitute the following clauses:

3 Membership of Commission

(1) Section 9 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

“(1) The Commission must consist of not less than 5 and not more than 7 members, of whom at least 3 must be barristers or solicitors of at least 5 years’ standing.”

(2) Section 9 of the principal Act is amended by inserting, after subsection (3), the following subsections:

“(3A) Two members, both of whom must be barristers or solicitors, must be appointed for the sole purpose of hearing and determining applications for cease and desist orders in accordance with **sections 74A to 74C**.

“(3B) No member appointed under **subsection (3A)** may sit with the other members of the Commission.”

3A Contracts, arrangements, or understandings containing exclusionary provisions prohibited

Section 29(2) of the principal Act is amended by omitting the words “of this section”, and substituting the expression “and (c)”.

New clauses 4A and 4B

To insert, after clause 4 (line 7 on page 3), the following clauses:

4A New heading and sections 36 to 36D substituted

(1) The principal Act is amended by repealing sections 36 and 36A, and the heading immediately before section 36, and substituting the following heading and sections:

“Taking advantage of market power

“36 Application

Nothing in **section 36A** or **section 36B** applies to any practice or conduct to which this Part applies that has been authorised under Part V.

“36A Taking advantage of market power

A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of—

“(a) restricting the entry of a person into that or any other market; or

“(b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or

“(c) eliminating a person from that or any other market.

“36B Taking advantage of market power in trans-Tasman markets

- “(1) A person must not, for any of the purposes specified in **subsection (2)**, take advantage of the person’s substantial degree of power (if any)—
- “(a) in a market; or
 - “(b) in a market in Australia; or
 - “(c) in a market in New Zealand and Australia.
- “(2) The purposes are as follows:
- “(a) restricting the entry of a person into a market that is not a market exclusively for services:
 - “(b) preventing or deterring a person from engaging in competitive conduct in a market that is not a market exclusively for services:
 - “(c) eliminating a person from a market, that is not a market exclusively for services.

“36C Purposes may be inferred

The existence of any of the purposes specified in **section 36A** or **section 36B**, as the case may be, may be inferred from the conduct of any relevant person or from any other relevant circumstances.

“36D Enforcement of statutory intellectual property right

For the purposes of **section 36A** or **section 36B**, as the case may be, a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual property right, within the meaning of section 45(2), in New Zealand.”

- (2) Section 2(1A) of the principal Act is amended by omitting the word “section”, and substituting the words “sections 36A, 36B, 36D, and”.
- (3) The principal Act is amended—
 - (a) by omitting from sections 3(1A), (1B), and (1C), 4(2), 6A, and 98H(1), and the heading to section 98H the expression “36A”, and substituting in each case the expression “**36B**”:
 - (b) by omitting from sections 45(1) and 78(1) the expression “36, 36A”, and substituting the expression “36A, 36B”.
- (4) Section 3(8) of the principal Act is repealed.

4B New section 47 substituted

- (1) The principal Act is amended by repealing section 47, and substituting the following section:

“47 Certain acquisitions prohibited

- “(1) A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.
- “(2) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected or associated.
- “(3) For the purposes of this section, a person is associated with another person if that person is able, whether directly or indirectly, to exert a substantial degree of influence over the activities of the other.
- “(4) A person is not able to exert a substantial degree of influence over the activities of another person for the purposes of subsection (3) by reason only of the fact that—
- “(a) those persons are in competition in the same market; or
- “(b) one of them supplies goods or services to the other.
- Compare: Trade Practices Act 1974 s 50 (Aust)”.
- (2) Sections 66(3)(a) and (b) and 67(3)(a) of the principal Act are amended by omitting the words “result in an effect described in paragraph (a) or paragraph (b) of section 47(1) of this Act”, and substituting in each case the words “have the effect of substantially lessening competition in a market”.
- (3) Sections 3(9) and 48 of the principal Act are repealed.

New clause 5A

To insert, after clause 5 (line 31 on page 4), the following clause:

5A New heading and sections 74A to 74D inserted

- (1) The principal Act is amended by inserting, immediately before the heading above section 75, the following heading and sections:

*“Cease and desist orders***“74A Commissioner may make cease and desist orders**

- “(1) A Commissioner may make a cease and desist order, by consent or following a hearing held under **section 74B**, if the Commissioner is satisfied that—
- “(a) a prima facie case has been made out that a person has engaged in any conduct referred to in section 80(1) or section 83(1); and
- “(b) it is necessary to act urgently—
- “(i) to prevent a particular person or consumers from suffering serious loss or damage:
- “(ii) in the interests of the public.
- “(2) Subject to **subsection (3)(a)**, the effect of a cease and desist order is to restrain conduct for such a period and on such terms as are specified in the order.

- “(3) A cease and desist order made under **subsection (1)**—
- “(a) may require a person to do something only if the Commissioner is satisfied that restraining the person from engaging in the conduct will not restore competition, or the potential for competition, in a market:
 - “(b) must be in writing with the facts and reasons for it clearly set out:
 - “(c) is deemed to be a determination of the Commission that is subject to appeal in accordance with sections 91 to 97.

“74B **Investigation, notice, and opportunity to be heard**

A cease and desist order may be made under **section 74A** only if—

- “(a) an investigation has been conducted into the alleged contravention of the Act and a report has been submitted to the Commission recommending that a cease and desist order be sought; and
- “(b) the Commission agrees with the recommendation in the report and directs an officer of the Commission to make an application for a cease and desist order; and
- “(c) the person against whom an order is sought is served with notice in writing of the following matters:
 - “(i) the nature of the alleged contravention:
 - “(ii) the terms of the proposed order:
 - “(iii) the reasons for the order; and
- “(d) the person against whom an order is sought has an opportunity to—
 - “(i) access the relevant information held by the Commission:
 - “(ii) make a written submission:
 - “(iii) consent to the terms of the proposed order or have the matter determined by a Commissioner following a hearing.

“74C **Procedure at cease and desist hearing**

At every hearing for a cease and desist order, the Commissioner presiding over the hearing—

- “(a) must provide for as little formality and technicality as the requirements of this Act and a proper consideration of the matter permits:
- “(b) must permit the Commission and the person against whom an order is sought to appear and give evidence, to be represented by counsel, to call witnesses, and to cross-examine witnesses:
- “(c) has the necessary incidental powers in relation to the hearing of evidence including the power to exclude

irrelevant or repetitive evidence and the powers set out in sections 99 and 100.

“74D Pecuniary penalties for contravention of cease and desist order

- “(1) If the Court is satisfied on the application of the Commission that a person has acted in contravention of an order made under **section 74A**, the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate.
- “(2) The amount of any pecuniary penalty must not exceed \$500,000.
- “(3) The standard of proof in proceedings under this section is the standard of proof applying in civil proceedings.
- “(4) In any proceedings under this section, the Commission, upon the order of the Court, may obtain discovery and administer interrogatories.
- “(5) Proceedings under this section may be commenced within 3 years after the contravention was discovered or ought reasonably to have been discovered. However, no proceedings under this section may be commenced 10 years or more after the date of the contravention.”
- (2) Section 92 of the principal Act is amended by adding the following paragraph:
- “(f) in case of an appeal against a determination of a Commissioner under **section 74A**, any person, against whom a cease and desist order was made.”

Clause 6: new section 80(2)(b)(i)

To omit the expression “\$5,000,000” (line 41 on page 4), and substitute the expression “\$10,000,000”.

Clause 7: new section 80A(1)

To omit paragraph (a) (lines 30 and 31 on page 5), and substitute the following paragraph:

- “(a) liability for payment of a pecuniary penalty under section 80 that arises out of a provision of a contract, arrangement, or understanding that is deemed, under section 30, to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market; or”.

Clause 10

To omit the words “renumbering subsection (3A) as (3B), and inserting before that subsection” (lines 20 and 21 on page 8), and substitute the words “repealing subsection (3A), and substituting”.

New clause 10A

To insert, after clause 10 (line 24 on page 8) the following clause:

10A New section 88A inserted

The principal Act is amended by inserting the following section:

“88A When undertaking as to damages not required by Commission

- “(1) If the Commission applies to the Court for the grant of an interim injunction under this Part, the Court must not, as a condition of granting an interim injunction, require the Commission to give an undertaking as to damages.
- “(2) However, in determining the Commission’s application for the grant of an interim injunction, the Court must not take into account that the Commission is not required to give an undertaking as to damages.”

Explanatory note

This Supplementary Order Paper replaces SOP No 203.

New clauses 1A and 1B effectively replace the Title of the principal Act with a new purpose provision, which is intended to clarify, rather than fundamentally change, the interpretation of the Act.

New clause 2(1) is a consequential amendment arising out of the new cease and desist order provisions in *new clause 5A*.

New clause 2(2) updates the definition of **Minister**.

Clause 3, which widens the scope of section 30 of the principal Act to also include bid rigging, market allocation, and output limitation agreements, is to be removed. The clause is to be replaced with *new clause 3*, which contains unrelated changes to the membership of the Commission as a result of the new cease and desist order provisions.

New clause 3A amends section 29 of the principal Act (which prohibits a person from entering into a contract or arrangement, or arriving at an understanding, that contains an exclusionary provision).

Specifically, *new clause 3A* inserts in subsection (2) a reference, which appears to have been inadvertently omitted. Subsection (2) helps to define what an exclusionary provision is by providing when a person is in competition with another person.

New clause 4A inserts *new sections 36 to 36D* in the principal Act (which effectively prohibits the use of a person’s dominant position in a market for certain purposes).

New section 36, which relates to the application of *new sections 36A and 36B*, has been carried over from sections 36(3) and 36A(3) of the principal Act.

New sections 36A and 36B replace sections 36 and 36A of the principal Act (which prohibit a person that has a dominant position in a market from using that position for certain specified purposes).

Those new sections will prohibit a person that has a substantial degree of power in a market from taking advantage of that power for certain specified purposes (which have not been altered).

New section 36C clarifies that an objective test may be used to establish the existence of any of the purposes specified in *new section 36A* or *section 36B*.

New section 36D, which excludes the enforcement of certain statutory intellectual property rights from being caught by *new section 36A* or *section 36B*, has been carried over from sections 36(2) and 36A(2) of the principal Act.

New clause 4B(1) substitutes *new section 47* in the principal Act (which prohibits certain acquisitions).

New section 47 effectively alters the merger threshold for certain acquisitions.

At present, the acquisition of assets of a business or shares that would result in a dominant position in a market is prohibited.

New section 47 provides that the acquisition of assets of a business or shares that would have, or would be likely to have, the effect of substantially lessening competition in a market is prohibited.

This proposed new threshold is the same as the threshold for these types of acquisitions in section 50 of the Trade Practices Act 1974 (Australia).

New clause 4B(2) and (3) contains some consequential amendments and repeals arising out of *new section 47*.

New clause 5A inserts *new sections 74A to 74D* in the principal Act, which relate to cease and desist orders that may be made by a Commissioner in certain circumstances.

New section 80(2) (substituted in the principal Act by *clause 6*) is amended by increasing 1 of the possible maximum amounts of pecuniary penalty from \$5,000,000 to \$10,000,000.

The scope of the prohibition on certain indemnities contained in *new section 80A* (inserted in the principal Act by *clause 7*) is to be limited to liability for pecuniary penalties under section 80 of the principal Act that arises out of price fixing activities that are deemed, under section 30 of the principal Act, to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market.

The amendment to *clause 10* and *new clause 10A* are related.

New clause 10A inserts *new section 88A* in the principal Act (which relates to undertakings as to damages given by the Commission).

New section 88A(1) effectively exempts the Commission from the requirement to give an undertaking as to damages where the Commissioner has applied for the grant of an interim injunction.

New section 88A(2), however, provides that the Court is not to take that exemption into account when the Court decides whether to grant an interim injunction.

The amendment to *clause 10* repeals section 88(3A) (which relates to the maximum damages that the Commission is liable to pay under an undertaking to pay damages given by it). That provision is no longer required as a result of *new section 88A*.

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