

Commerce Amendment Act 2001

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The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Commerce Amendment Act 2001.
- (2) In this Act, the Commerce Act 1986 is called “the principal Act”.

2 Commencement

- (1) This Act (except sections 6 and 15) comes into force on the day after the date on which it receives the Royal assent.
- (2) Sections 6 and 15 come into force on a date to be appointed by the Governor-General by Order in Council.

Sections 6 and 15 were brought into force, as from 1 April 2002, by clause 2 Commerce Amendment Act 2001 Commencement Order 2002 (SR 2002/64).

Part 1

Amendments to certain existing preliminary provisions

3 Title repealed

The Title of the principal Act is repealed.

4 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 competition in markets for the long-term benefit of consumers within New Zealand.”

5 Interpretation

Section 2(1) of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions:

“**accounting period** has the same meaning as in section 2(1) of the Financial Reporting Act 1993, except that every reference to an entity is a reference to a body corporate

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

“**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

“**turnover** means the total gross revenues (exclusive of any tax required to be collected) received or receivable by a body corporate in an accounting period as a result of trading by that body corporate within New Zealand”.

6 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 6 and not more than 8 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.”

Subsection (1) was substituted, as from 20 December 2001, by section 158 Telecommunications Act 2001 (2001 No 103).

Sections 6 and 15 were brought into force, as from 1 April 2002, by clause 2 Commerce Amendment Act 2001 Commencement Order 2002 (SR 2002/64).

Part 2 Amendments relating to certain anti-competitive conduct and authorisations

7 Contracts, arrangements, or understandings containing exclusionary provisions prohibited

(1) Section 29(1) of the principal Act is amended by omitting the word “For”, and substituting the words “Subject to subsection (1A), for”.

(2) Section 29 of the principal Act is amended by inserting, after subsection (1), the following subsection:

- “(1A) A provision of a contract, an arrangement, or an understanding that would, but for this subsection, be an exclusionary provision under subsection (1) is not an exclusionary provision if it is proved that the provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market.”
- (3) Section 29(2) of the principal Act is amended by omitting the words “of this section”, and substituting the expression “and (c)”.

8 Repeal of section 35

Section 35 of the principal Act is repealed.

9 New heading and sections 36 to 36B substituted

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

“Taking advantage of market power

“36 Taking advantage of market power

- “(1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorised under Part V.
- “(2) 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.
- “(3) For the purposes of this section, 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.
- “(4) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.

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

- “(1) Nothing in this section applies to any practice or conduct to which this Part applies that has been authorised under Part V.
- “(2) A person must not, for any of the purposes specified in subsection (3), 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.
- “(3) 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.
- “(4) For the purposes of this section, 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) a statutory intellectual property right, within the meaning of section 45(2), in New Zealand:
 - “(b) a statutory intellectual property right in Australia.
- “(5) For the purposes of this section, a reference to a person includes 2 or more persons that are interconnected.

“36B Purposes may be inferred

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

- (2) Section 2(1A) of the principal Act is amended by omitting the word “section”, and substituting the words “sections 36, 36A, and”.
- (3) Section 3(1A) to (1C) of the principal Act is amended by omitting the expression “(1)”, and substituting in each case the expression “(2)”.

- (4) Section 3(8) of the principal Act is repealed.

10 Other exceptions

- (1) Section 44(1) of the principal Act is amended by repealing paragraph (b).

- (2) Section 44 of the principal Act is amended by inserting, after subsection (1), the following subsection:

“(1A) Nothing in this Part (except sections 36 and 36A) applies to—

“(a) the entering into of a contract or arrangement, or arriving at an understanding, or the giving or requiring the giving of a covenant, if the only parties, or (in the case of a covenant or proposed covenant) the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant, are, or would be, interconnected bodies corporate:

“(b) any act done to give effect to a provision of a contract, arrangement, or understanding, or to a covenant referred to in paragraph (a).”

11 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) 1 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, or would be likely to have, the effect of substantially lessening competition in a market”.
- (3) Sections 3(9) and 48 of the principal Act are repealed.

12 New Part 4 substituted

The principal Act is amended by repealing Part 4, and substituting the following Part:

“Part IV

“Controlled goods or services

“Imposition of control

“52 When control may be imposed

Goods or services may be controlled if—

- “(a) the goods or services are, or will be, supplied or acquired in a market in which competition is limited or is likely to be lessened; and
- “(b) it is necessary or desirable for those goods or services to be controlled either—
- “(i) in the interests of persons acquiring the goods or services (whether directly or indirectly), if the goods or services are acquired from a person who faces limited or lessened competition for the supply of those goods or services; or
- “(ii) in the interests of suppliers, if the goods or services are supplied to a person who faces limited or lessened competition for the acquisition of those goods or services.

“53 How control can be imposed

- “(1) Goods or services are controlled if an Order in Council declares that they are controlled.
- “(2) The Governor-General may make an order on the recommendation of the Minister.

“(3) The Minister must not make a recommendation unless the Minister is satisfied that the goods or services may be controlled under section 52.

“(4) The Minister may make a recommendation on his or her own initiative or following a report from the Commission.

“**54 Minister may seek advice from Commission as to thresholds for imposing controls**

“(1) The Minister may require the Commission to advise him or her on the thresholds that would assist him or her in assessing whether goods or services should be controlled under section 52.

“(2) Thresholds can be expressed in quantitative or qualitative terms.

“(3) If the Minister requires advice on thresholds under this section,—

“(a) the requirement must be in writing; and

“(b) the requirement must specify the date by which the Commission must provide the advice; and

“(c) the Commission must advise accordingly.

“(4) The Minister must publish the Commission’s advice in a manner that he or she considers appropriate.

“**55 Effect of control being imposed**

“(1) No person may supply any controlled goods or services unless—

“(a) an authorisation under section 70 or section 71, or an undertaking under section 72, has come into effect in respect of those goods or services; and

“(b) the goods or services are supplied in compliance with the authorisation or undertaking.

“(2) A provision of a contract or a covenant that contravenes subsection (1) is not enforceable.

*“Miscellaneous provisions***“56 Reports from Commission to Minister about controls**

- “(1) The Commission may report to the Minister on whether or not an Order in Council under section 53 should be made, amended, or revoked.
- “(2) The Commission may have regard, in considering a report, to all matters it considers necessary or desirable.
- “(3) The Commission may report at any time on its own initiative or following a request from the Minister.
- “(4) If the Minister requests a report,—
- “(a) the request must be in writing; and
 - “(b) the request must specify the date by which the Commission must report; and
 - “(c) the Commission must report accordingly.
- “(5) The Minister must publish the Commission’s report in a manner that he or she considers appropriate.
- “(6) Section 70E applies when the Commission is making a report as if the goods or services subject to the report were controlled goods or services, and with any other necessary modifications.

“57 Commission process

- “(1) Before giving any advice to the Minister on thresholds under section 54 or making any report under section 56, the Commission must—
- “(a) publish its intention to do so and invite interested persons to give their views on the matter; and
 - “(b) give a reasonable opportunity to interested persons to give those views; and
 - “(c) have regard to those views.
- “(2) The notice of intention must—
- “(a) be published in the *Gazette* and in any other manner (if any) that the Commission considers appropriate; and
 - “(b) specify the matter to which the advice or report will relate; and
 - “(c) invite interested persons to give their views on that matter to the Commission, and specify the time and manner within which they may do so.

“57A Technical provisions relating to declaration of control

- “(1) An Order in Council made under section 53 may identify the goods or services to which it relates—
- “(a) by a description of the goods or services; or
 - “(b) by a description of the kind or class to which the goods or services belong.
- “(2) The order may apply to goods or, with all necessary modifications, to services—
- “(a) supplied in or for delivery within specified regions, areas, or localities in New Zealand:
 - “(b) supplied in different quantities, qualities, grades, or classes:
 - “(c) supplied by or to or for the use of different persons or classes of persons.
- “(3) This section applies so that any part or element of goods or services can be dealt with separately.
- “(4) The order must specify the date on which it expires.
- “(5) If an order is made in the interests of suppliers, references in this Act to ‘supply’ and ‘supplier’ are to be read with any necessary modifications as if they related to the acquisition, or person acquiring, the controlled goods or services.
- “(6) The order is a regulation within the meaning of the Regulations (Disallowance) Act 1989.

“57B Records to be kept for control purposes

- “(1) Every supplier of controlled goods or services must retain the accounts and costing records in relation to the controlled goods or services that the Commission may from time to time specify, either in relation to suppliers of those goods or services generally, or in relation to a particular supplier of the goods or services.
- “(2) The supplier must retain those accounts and records for a period of 7 years from the date on which the goods or services to which they relate cease to be controlled goods or services.

“57C Other Acts relating to price control not affected

Nothing in this Part and Part V limits or affects the exercise by any person of any power to authorise the prices for, or impose controls on, goods or services under any other Act.”

13 New sections 59 to 59B substituted

The principal Act is amended by repealing section 59, and substituting the following sections:

“59 Contracts or covenants subject to authorisation not prohibited under certain conditions

- “(1) Despite anything in this Act, but subject to section 59B,—
- “(a) a contract to which section 27 or section 29 applies may be entered into if the requirements of subsection (2) are complied with:
 - “(b) a covenant to which section 28 applies may be required to be given, or may be given, if the requirements of subsection (2) are complied with.
- “(2) For the purposes of subsection (1), the requirements that must be met are,—
- “(a) in the case of a contract to which section 27 or section 29 applies, that the contract is subject to a condition that the provision, or exclusionary provision, as the case may be, does not come into force unless and until authorisation is granted to give effect to the provision, or exclusionary provision and that application must be made for that authorisation within 15 working days after the contract is entered into:
 - “(b) in the case of a covenant to which section 28 applies, that the covenant is subject to the condition that it does not have effect unless and until authorisation is granted to give effect to it and that application must be made for that authorisation within 15 working days after the covenant is made.

“59A When Commission may grant authorisation

- “(1) The Commission may grant an authorisation to a person—
- “(a) to enter into a contract or arrangement, or to arrive at an understanding, even though the contract or arrangement has been entered into, or the understanding has been ar-

- rived at, before the Commission makes a determination in respect of the application for that authorisation; or
- “(b) to give effect to a provision of a contract or arrangement entered into, or an understanding arrived at, even though the applicant has already given, or is already giving, effect to the provision before the Commission makes a determination in respect of the application for that authorisation; or
 - “(c) to require the giving of, or to give, a covenant even though the covenant has been given before the Commission makes a determination in respect of the application for that authorisation; or
 - “(d) to do an act or engage in conduct referred to in section 37 or section 38 even though the applicant has already done the act or is already engaging in the conduct before the Commission makes a determination in respect of the application for that authorisation.
- “(2) Subject to subsection (3), all of the parties to the contract, arrangement, or understanding must, unless and until authorisation is granted, discontinue—
- “(a) giving effect to the provision of the contract, arrangement, or understanding;
 - “(b) engaging in conduct referred to in section 37 or section 38.
- “(3) The parties to the contract, arrangement, or understanding may do any of the things set out in subsection (2) as long as any of the parties establishes to the satisfaction of the Commission that discontinuing any of those things would, or would be likely to, result in exceptional hardship to any of the parties.

“59B Contraventions not prevented by granting of authorisation under section 59 or section 59A

Nothing in section 59 or section 59A prevents conduct that occurred before an authorisation was granted in respect of it and that would otherwise have constituted a contravention of this Act from continuing to constitute a contravention.”

14 New heading and sections 70 to 74 substituted

The principal Act is amended by repealing the heading before section 70 and sections 70 to 74 (authorisations for controlled goods or services), and substituting the following heading and sections:

“Authorisations in respect of controlled goods or services

“70 Authorisations in respect of prices, revenues, and quality standards

- “(1) The Commission may make an authorisation in respect of all or any component of the prices, revenues, or quality standards that apply in respect of the supply of controlled goods or services, using whatever approach it considers appropriate.
- “(2) The approach may include the use of formulas or other methods from which prices or revenues, or any part of a price or revenue, may be determined.
- “(3) Different authorisations in respect of prices, revenues, or quality standards for controlled goods or services may be made to meet different circumstances relating to the supply of those goods or services.
- “(4) Section 57A(1) to (3) applies to the authorisation with any necessary modifications.

“70A Considerations to be observed by Commission

In exercising its powers under section 70, the Commission must have regard to—

- “(a) the extent to which competition is limited or is likely to be lessened in respect of the controlled goods or services:
- “(b) the necessity or desirability of safeguarding the interests of persons who acquire (whether directly or indirectly) or supply the controlled goods or services:
- “(c) the promotion of efficiency in the production and supply or acquisition of the controlled goods or services.

“70B Procedure for making authorisations

- “(1) An authorisation under section 70 may be made—

- “(a) on application by a supplier of controlled goods or services; or
 - “(b) by the Commission on its own initiative.
- “(2) Section 60 (procedure for applications), except subsections (3) and (6), applies to an application as if it were an application under section 58.
- “(3) The Commission must have regard to any submissions made to it by the supplier or any acquirer of the goods or services.
- “(4) The Commission must give a copy of the authorisation to the supplier of the goods or services.
- “(5) The authorisation must include the Commission’s reasons for making the authorisation.
- “(6) The Commission must publicise the fact that it has given an authorisation, and details of where the authorisation may be found, in the *Gazette*.

“70C Remedies and penalties if overcharging or quality standards breached

- “(1) The Commission may impose, as part of an authorisation, provisions providing for remedies and penalties that apply if—
- “(a) the prices determined by the Commission in an authorisation are lower than any price charged to any person under a provisional authorisation:
 - “(b) higher prices are charged, or higher revenues are derived, than those allowed for in an authorisation:
 - “(c) quality standards are breached.
- “(2) The remedies and penalties may include—
- “(a) the payment of refunds, specified amounts, and compensation to persons acquiring or supplying the goods or services; or
 - “(b) the making of deductions from the prices charged in the future to persons acquiring the goods or services.
- “(3) The remedies and penalties set by the Commission must be reasonable, taking into account the matters in section 70A.
- “(4) The Commission may require the supplier to ensure that, to the extent practicable, the persons who have been affected by the higher prices or revenues or breach of quality standards receive the benefit of the remedies and penalties.

- “(5) Subsection (4) applies whether or not those persons are persons in a direct contractual relationship with the supplier or are end consumers.
- “(6) The Commission has the necessary powers to monitor and enforce a requirement under this section.
- “(7) Section 86 applies to a failure to comply with this section as if it were a breach of section 55.

“70D Terms of authorisations

- “(1) An authorisation granted by the Commission under section 70 may include provisions, not inconsistent with this Act, as the Commission thinks necessary or desirable for the proper administration of the authorisation or to ensure compliance with its provisions.
- “(2) For the purpose of informing acquirers and prospective acquirers of the effect of an authorisation, the Commission may require the supplier of those goods or services to communicate to acquirers the terms of an authorisation, in a manner and in the circumstances that the Commission thinks fit.
- “(3) Section 70C does not limit this section.

“70E Investigations and audits

- “(1) The purpose of this section is to enable the Commission to gather information on which to make, administer, amend, or revoke authorisations in respect of controlled goods or services.
- “(2) The Commission may—
 - “(a) consult with any persons the Commission considers may assist it:
 - “(b) conduct any investigations or audits—
 - “(i) of how effectively and efficiently a supplier of controlled goods or services is supplying those goods or services:
 - “(ii) of how any formula being considered by the Commission may be applied, or how any formula authorised by the Commission has been applied, in determining prices, revenues, or quality standards:

- “(iii) of how any conditions related to the quality of any controlled goods or services may be, or are being, fulfilled:
 - “(c) as part of an investigation or audit, examine, consider, or investigate any activity, cost, revenue, transfer, asset valuation, circumstance, or event that is occurring or that occurred during the 7 years before the investigation or audit:
 - “(d) by notice in writing, require the supplier of the goods or services—
 - “(i) to prepare and produce forecasts, forward plans, or other information:
 - “(ii) to apply any methodology specified by the Commission in the preparation of forecasts, forward plans, or other information:
 - “(e) by notice in writing, require the supplier of the goods or services, or any previous supplier of the goods or services whom the Commission has reason to believe may have information or documents relevant to an investigation or audit, at the time and place specified in the notice,—
 - “(i) to produce or supply to the Commission documents and information in relation to those goods or services, or the prices, revenues, or operations of that person in respect of those goods or services:
 - “(ii) to answer any questions about any matter that the Commission has reason to believe may be relevant to the investigation or audit:
 - “(f) by notice in writing, require the supplier of the goods or services, at the time and place specified in the notice, to produce or supply to the Commission an expert opinion from an appropriately qualified person, or from a member of a class of appropriately qualified persons, as determined by the Commission in relation to the matters in paragraphs (b), (c), or (e)(i).
- “(3) A person is not excused from answering a question or giving any information or document under this section on the ground that to do so may incriminate or tend to incriminate that person.

“(4) Despite section 79, a self-incriminating statement or document made or given under this Act is not admissible as evidence in criminal proceedings (except proceedings under section 103).

“(5) The powers of the Commission under this section—
“(a) do not limit its other powers under this Act; and
“(b) do not, in their specificity, limit the generality of the other powers under this Act.

“**70F Revocation and amendment of authorisations**

“(1) An authorisation made under section 70 may be amended or revoked at any time by the Commission by notice in the *Gazette*.

“(2) The Commission must, as soon as practicable, send a copy of a notice of revocation or amendment of an authorisation to the supplier of the goods or services.

“**71 Provisional authorisations**

“(1) The Commission may authorise the supply of controlled goods or services to any person on terms determined by the Commission and specified in the notice, on the condition that the terms are only a provisional authorisation, pending the making of a final determination under section 70.

“(2) The provisions of this Act (except section 70A) applying to authorisations under section 70 apply with any necessary modifications to provisional authorisations.

“**72 Alternative undertakings**

“(1) The Commission may, instead of making an authorisation in respect of controlled goods or services, obtain or accept a written undertaking from the supplier of those goods or services in relation to those goods or services.

“(2) Subsection (1) applies despite anything in this Part.

“(3) Sections 70A, 70E, and 70F (and section 70C, if the supplier agrees) apply with any necessary modifications as if the undertaking were an authorisation under section 70.

“73 Conferences in relation to authorisations about controlled goods or services

- “(1) The Commission may determine to hold a conference before making an authorisation, or obtaining or accepting an undertaking, in respect of any controlled goods or services, and—
- “(a) must appoint a date, time, and place for the holding of the conference; and
 - “(b) must give notice of the date, time, and place, and of the matters to be considered at the conference, to the supplier.
- “(2) Section 64 applies to a conference called under this section as if—
- “(a) the reference in that section to a conference called under section 62 were a reference to a conference called under this section; and
 - “(b) the reference in section 64(1)(b) to a person to whom a draft determination was sent under section 62(2) were a reference to the supplier of the controlled goods or services; and
 - “(c) the reference in section 64(6) to the making of a determination in respect of an application were a reference to making an authorisation in respect of the controlled goods or services or obtaining or accepting an undertaking in relation to the controlled goods or services, as the case may be.

“74 Levies

- “(1) The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations requiring 1 or more suppliers of goods or services that are controlled under Part IV to pay a levy to the Minister in each financial year.
- “(2) The order must specify the amounts of the levy or the method by which the levy is to be calculated.
- “(3) The Minister must calculate the amount of the levy to be paid so as to ensure that the estimated costs to the Commission of administering Part IV and sections 70 to 74 for goods and services that are controlled under Part IV can be met fully out of levies, and may recalculate that amount in any subsequent financial year.

- “(4) Every supplier of controlled goods or services must pay any levy so required.
- “(5) The Minister must consult with the suppliers of controlled goods or services, or representatives of those suppliers, before making a recommendation.
- “(6) The Minister may refund, in whole or in part, payment of any levy paid by any 1 or more suppliers under this section.
- “(7) The amount of any unpaid levy is recoverable in any court of competent jurisdiction as a debt due to the Crown.”

Part 3

Amendments relating to enforcement and remedies, and miscellaneous provisions

15 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 74C, 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 any period and on any terms that 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 this 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 any pecuniary penalty that 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 matter giving rise to 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 matter giving rise to the contravention.”
- (2) Section 92 of the principal Act is amended by adding the following paragraph:
- “(f) in the case of an appeal against a determination of a Commissioner under section 74A, any person against whom a cease and desist order was made.”

Sections 6 and 15 were brought into force, as from 1 April 2002, by clause 2 Commerce Amendment Act 2001 Commencement Order 2002 (SR 2002/64).

16 Jurisdiction of High Court

- (1) Section 75(1) of the principal Act is amended by inserting, before paragraph (a), the following paragraph:
- “(aa) applications for orders under section 74D:”.

(2) Section 75(1) of the principal Act is amended by adding the following paragraphs:

“(f) applications for orders under section 80B or section 80C:

“(g) proceedings for offences against section 80E:

“(h) applications for orders under section 82A.”

17 Pecuniary penalties

(1) Section 80(1) of the principal Act is amended by omitting all the words after the word “appropriate”.

(2) Section 80 of the principal Act is amended by repealing subsection (2), and substituting the following subsections:

“(2) The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.

“(2A) In determining an appropriate penalty under this section, the Court must have regard to all relevant matters, in particular,—

“(a) any exemplary damages awarded under section 82A; and

“(b) in the case of a body corporate, the nature and extent of any commercial gain.

“(2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—

“(a) in the case of an individual, \$500,000; or

“(b) in the case of a body corporate, the greater of—

“(i) \$10,000,000; or

“(ii) either—

“(A) if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or

“(B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).”

(3) Section 80 of the principal Act is amended by repealing subsection (5), and substituting the following subsection:

“(5) Proceedings under this section may be commenced within 3 years after the matter giving rise to 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 matter giving rise to the contravention.”

18 New sections 80A to 80E inserted

The principal Act is amended by inserting, after section 80, the following sections:

“80A Body corporate not to indemnify certain persons in respect of pecuniary penalties

“(1) A body corporate must not indemnify a director, servant, or agent of the body corporate or an interconnected body corporate in respect of—

“(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

“(b) costs incurred by that director, servant, or agent in defending or settling any proceeding relating to that liability.

“(2) An indemnity given in contravention of subsection (1) is void.

“(3) In this section,—

“**agent** includes a former agent

“**director** includes a former director

“**indemnify** includes relieve or excuse from liability, whether before or after the liability arises; and **indemnity** has a corresponding meaning

“**servant** includes a former servant.

“80B Pecuniary penalties for contravention of section 80A

“(1) If the Court is satisfied on the application of the Commission that a body corporate has acted in contravention of section 80A, the Court may order the body corporate to pay to the Crown any pecuniary penalty that the Court determines to be appropriate.

- “(2) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed 2 times the value of any indemnity given in contravention of section 80A.
- “(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 matter giving rise to 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 matter giving rise to the contravention.

“80C Court may order certain persons to be excluded from management of body corporate

The Court may make an order that a person must not, without the leave of the Court, be a director or promoter of, or in any way, either directly or indirectly, be concerned or take part in the management of, a body corporate for a period not exceeding 5 years as may be specified in the order, if the Court is satisfied on the application of the Commission that—

- “(a) the person has entered into a contract or arrangement, or arrived at an understanding, containing a provision that is deemed by section 30(1) to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market:
- “(b) the person has given effect to a provision of a contract, arrangement, or understanding that is deemed by section 30(1) to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market:
- “(c) the person has entered into a contract or arrangement, or arrived at an understanding, that contains an exclusionary provision:
- “(d) the person has given effect to an exclusionary provision of a contract, arrangement, or understanding.

“80D Application for order under section 80C

- “(1) The Commission must give not less than 10 days’ notice of its intention to apply for an order under section 80C to the person against whom the order is sought.
- “(2) On the hearing of the Commission’s application or an application for leave by a person against whom an order under section 80C has been made,—
- “(a) the Commission must appear and call the attention of the Court to any matter that seems to it to be relevant, and may give evidence or call witnesses; and
 - “(b) the person against whom the order is sought or has been made may appear and give evidence or call witnesses.
- “(3) The Registrar of the Court must, as soon as practicable after the making of an order under section 80C, give notice of the order to—
- “(a) the person against whom the order has been made; and
 - “(b) the Registrar of Companies, and the Registrar of Companies must give notice in the *Gazette* of the name of the person against whom the order is made.

“80E Offence to act in contravention of order made under section 80C

- “(1) Every person commits an offence who acts in contravention of an order made under section 80C.
- “(2) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$200,000.
- “(3) The offence is triable on indictment.”

19 Actions for damages for contravention of Part 2

Section 82 of the principal Act is amended by repealing subsection (2), and substituting the following subsection:

- “(2) An action under subsection (1) may be commenced within 3 years after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered. However, no action under subsection (1) may be commenced 10 years or more after the matter giving rise to the contravention.”

20 New section 82A inserted

The principal Act is amended by inserting, after section 82, the following section:

“82A Exemplary damages for contravention of Part II

- “(1) The Court may order a person who has engaged in any conduct referred to in section 82(1) to pay exemplary damages even though the Court has made, or may make, an order directing the person to pay a pecuniary penalty under section 80 for the same conduct.
- “(2) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the Court must have regard to—
- “(a) whether a pecuniary penalty has been imposed on the defendant for a contravention involving the conduct concerned in the claim for exemplary damages; and
 - “(b) if so, the amount of the pecuniary penalty.”

21 Contravention of section 55 an offence

Section 86(1) of the principal Act is amended—

- (a) by omitting from paragraph (a) the expression “\$10,000”, and substituting the expression “\$50,000”;
- (b) by omitting from paragraph (b) the expression “\$30,000”, and substituting the expression “\$500,000”.

22 General provisions relating to granting of injunctions

Section 88 of the principal Act is amended by repealing subsection (3A), and substituting the following subsection:

- “(3A) In determining whether to grant an interim injunction under this section, the Court must give any weight that the Court considers appropriate to the interests of consumers or, as the case may be, acquirers.”

23 New section 88A inserted

The principal Act is amended by inserting, after section 88, 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.”

24 Appeals in relation to determinations by Commission

(1) Section 91 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

“(1) Subject to sections 92 to 95, and to subsection (2),—

“(a) there is a right of appeal to the High Court against any determination of the Commission under this Act that is not a determination of the Commission under section 70:

“(b) there is a right of appeal to the High Court by way of case stated for the opinion of the Court on a question of law only against any determination of the Commission under section 70.”

(2) Section 93 of the principal Act is consequentially amended by inserting, after the word “appeal” in the first place where it appears, the words “(other than an appeal under section 91(1)(b))”.

25 Offences

Section 103 of the principal Act is amended by adding the following subsection:

“(5) Proceedings for an offence against subsection (4) may be commenced within 6 months after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.”

26 Provisions as to proceedings already barred and pending proceedings

Nothing in this Act—

- (a) enables any proceedings to be brought that were barred before the commencement of this Act; or
- (b) affects any proceedings commenced before the commencement of this Act.

27 Consequential amendments

- (1) Section 86(2) of the principal Act is amended by omitting the words “the authorised price for those goods or services”, and substituting the words “the price that should have been charged for those goods or services in accordance with the authorisation, provisional authorisation, or undertaking”.
- (2) Section 87(b) of the principal Act is amended by repealing subparagraph (ii), and substituting the following subparagraph:
“(ii) any provisional authorisation under section 71 in respect of those controlled goods or services:”.
- (3) Section 103(1)(a) of the principal Act is amended by inserting, after the words “notice under”, the expression “section 70E or”.
- (4) Section 108(cb) of the principal Act is amended by omitting the expression “section 70(1)”, and substituting the expression “section 70B”.
- (5) Section 13(1) of the Ministry of Energy (Abolition) Act 1989 is amended by repealing the expression “sections 53 and 54 of the Commerce Act 1986”, and substituting the expression “sections 53, 54, and 56 of the Commerce Act 1986”.

Legislative history

27 March 2001	Introduction (Bill 111-1)
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