
COMPETITION

NEW CARTEL-BUSTING TOOLS FOR THE COMMERCE COMMISSION

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A new bill introduced into Parliament provides the Commerce Commission with more power to fight cartels.

The Commerce Commission (International Co-operation, and Fees) Bill will enable greater co-operation between the Commerce Commission and its overseas counterparts, most notably the Australian Competition and Consumer Commission (ACCC).

The bill will allow the Commission to share information it has acquired from its own investigations with other regulatory bodies, even where that information is otherwise confidential. The bill also permits the Commission to exercise statutory information gathering powers to assist its overseas counterparts.

On the basis of reciprocity, the flip-side is the Commission will receive more information from overseas regulators to assist its investigations into alleged cartel conduct affecting New Zealand.

The bill will have important ramifications as most cartels and alleged cartels affecting New Zealand have an international dimension and there are reasonably strong impediments to this form of co-operation between regulators under the current legislative regime.

Main features of the bill

Government co-operation agreements

Before the Commission can provide investigative assistance and information to overseas regulators, there must be a co-operation arrangement in place between governments. The bill sets out minimum requirements for these agreements. This means the Commission cannot simply pass information to any overseas regulator it chooses.

Informing those concerned

The Commission must advise any person to whom the information relates that the information has been provided to an overseas regulator, unless this disclosure would compromise the overseas regulator or the Commission's investigation. In practice, such disclosure may often arguably prejudice the investigation, e.g. it may "tip off" the company that an overseas regulator is investigating a particular industry, or – if the information has been received pursuant to a leniency application – disclosure could reveal the identity or existence of the "whistleblower".

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Protection of privileged information

If the Commission has a privilege in respect of certain communications or information, the bill provides that the privilege is not waived merely because the privileged communication or information is provided to an overseas regulator. Similarly, any information that the Commission receives from an overseas regulator that is privileged in the overseas jurisdiction will be treated as if subject to an analogous privilege for the purposes of New Zealand law. There are additional protections in relation to “negotiation privilege”. The application of these provisions will be closely watched, given the importance of protecting privilege in the cartel context.

While it is hard to argue with a bill that seeks to better equip regulators to detect and deter cartel behaviour, it does mean New Zealand businesses are likely to face greater information gathering demands from the Commerce Commission.

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