

TERMS OF REFERENCE

REVIEW OF REGULATORY CONTROL PROVISIONS OF THE COMMERCE ACT

13 September 2006

Context

In May 2006, the Minister of Commerce announced a review of the regulatory control provisions and the authorisation and clearance provisions of the Commerce Act 1986, to ensure that the provisions in these Parts are working efficiently and effectively. This terms of reference outlines the scope and timeframes for the stream relating to the review of regulatory control provisions. A separate terms of reference has been prepared for the stream relating to authorisations and clearances.

The Review will be led by the Ministry of Economic Development, which is responsible for monitoring New Zealand's competition policy framework and operation of the Commerce Act 1986, with a view to ensuring that it supports effective and competitive markets for the long-term benefits of consumers within New Zealand.

Parts 4 and 4A and sections 70-74 of Part 5 relate to regulatory control provisions within the Commerce Act. Part 4 of the Commerce Act allows for goods or services to be placed under price, revenue, or quality control (regulatory control) subject to specific tests being met. Part 4A of the Commerce Act allows for individual electricity lines businesses to be placed under regulatory control if they breach thresholds set by the Commerce Commission. Once a decision has been made to impose control under Part 4 or 4A, the controlled good or service may not be supplied unless an authorisation to supply has been made under Part 5.

Since 2001 there have been inquiries into whether regulatory control should be declared in respect of airport activities and gas pipeline services. Thresholds for the control of electricity lines businesses have been set under Part 4A and the Commission has conducted inquiries into several businesses that have breached the thresholds. Regulatory control has been declared over some gas pipeline services.

The Ministry, in undertaking its ongoing role of monitoring the effectiveness of the Commerce Act, has identified some potential issues with these Parts that may need to be addressed.

Proposed Scope of the Review of the Regulatory Control Provisions

The overarching objective, in reviewing the regulatory control provisions of the Commerce Act, is to ensure that the imposition of regulatory control is consistent with providing for the long-term benefit of consumers within New Zealand.

Consistent with this objective, the Review will consider whether any amendments to the Act are desirable to reinforce the Government's policy objectives on investment in infrastructure.

The Review will look to ensure:

1. There is clarity around the policy intent of imposing control.

2. There is appropriate guidance for business and regulators on *when* control is likely to be imposed.
3. There is appropriate guidance for business and regulators on *how* regulatory control should be imposed.
4. There are effective and efficient processes to determine when and how control is imposed.

It is desirable that the legislation is clear regarding the policy intent of regulatory control, and on when and how regulatory control will be imposed in practice. Clarity assists both the Commission (in providing advice on when control should be imposed and when making an authorisation to control) and the Minister (in making a decision under Part 4 on whether to impose control), in addition to providing guidance to consumers and suppliers.

Specific matters that the Review will examine include (but are not limited to):

- what is the purpose of imposing control;
- in what circumstances should control be imposed;
- should large electricity lines businesses continue to be subject to targeted control (as distinct from universal control);
- if targeted control is appropriate, what enhancements should be made to the present regime;
- what is the appropriate threshold for when control should be introduced;
- what is the appropriate guidance on how control should be imposed (including the form, level, and duration of control and applicable methodologies);
- is the current process of deciding whether to impose control (Parts 4 and 4A) and then how to impose control (Part 5) in two distinct steps appropriate;
- what level of consultation is appropriate in deciding whether and how to impose control;
- does the Act provide sufficient discretion for the Commission to advise on all matters it considers desirable; and
- what appeal rights are appropriate in respect of decisions on when and how control is imposed.

Proposed Approach for Review

The Review of the Regulatory Control Provisions of the Commerce Act will require a whole-of-government process led by the Ministry of Economic Development, in consultation with the Treasury, Commerce Commission, Department of Prime Minister and Cabinet, Ministry of Consumer Affairs, Ministry of Justice, and others as appropriate.

The Review will also require input from industry, Commerce Act practitioners, and other interested parties. To garner this input, the Ministry proposes to run an 'advisory group' process, whereby identified stakeholders are consulted on the potential issues and solutions. This will assist the Ministry in drafting a discussion document.

The Ministry proposes that full public consultation will then be undertaken through the release of a discussion document canvassing the issues and options to proceed, with a formal submission process.

Timeframe

The following timetable is proposed for the Review of Regulatory Control Provisions.

<p>Preparation of discussion document</p> <p>MED to draft discussion document for public release in consultation with:</p> <ul style="list-style-type: none"> • departments including the Commerce Commission, Ministry of Consumer Affairs, Treasury, Department of Prime Minister of Cabinet, Ministry of Justice, and other departments as required; and • targeted stakeholders through an 'advisory group' process. 	<p>Approx 4 Months</p> <p>Mid September 2006 – January 2007</p>
<p>Cabinet approval to release discussion document</p> <p>Seek Cabinet approval for the full public release of the discussion document.</p>	<p>Approx 1 Month</p> <p>End January 2007</p>
<p>Consultation on discussion document</p> <p>Discussion document posted on Ministry of Economic Development website for 3 month public consultation period. Release announced by the Minister of Commerce.</p>	<p>3 Months</p> <p>February 2007 – May 2007</p>
<p>Policy recommendations</p> <ul style="list-style-type: none"> • Submissions considered; • Policy recommendations decided in consultation with departments and stakeholders as required; • Policy recommendations provided to the Minister of Commerce. 	<p>Approx 4 Months</p> <p>May 2007 – August 2007</p>
<p>Proposals for Cabinet Approval</p>	<p>September 2007</p>