

# **TERMS OF REFERENCE: REVIEW OF AUTHORISATION AND CLEARANCE PROVISIONS OF THE COMMERCE ACT**

13 September 2006

## **Context**

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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 of the Act are working efficiently and effectively. This terms of reference outlines the scope and the timeframes for the stream relating to the authorisation and clearance provisions. A separate terms of reference has been prepared for the stream relating to the regulatory control provisions.

Sections 58-69B of Part 5 of the Commerce Act contain provisions relating to the authorisation and clearance of business acquisitions and restrictive trade practices. Authorisation is able to be sought for most types of practices and business acquisitions substantially lessening competition, if sufficient benefits to the public are shown that outweigh any detriments arising from the practice. Clearance is able to be sought for business acquisitions that may or may not substantially lessen competition.

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.

It is generally accepted that New Zealand's clearance and authorisation processes are of a high standard. The Review will draw on the experiences of regulators and practitioners to further improve the authorisation and clearance processes.

The Commerce Act was substantially amended in 2001, predominantly to enhance the Part 2 and 3 competition thresholds and deterrents against anticompetitive behaviour. This Review will not re-examine the Part 2 and 3 thresholds, given that they were substantively reviewed and amended recently.

## **Proposed Scope of Review of Authorisation and Clearance Provisions**

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The Review will look to ensure that the authorisation and clearance provisions within the Commerce Act provide the appropriate degree of:

1. Accountability and transparency of decision making.
2. Participation by interested parties.
3. Analytical rigour and due process.
4. Timeliness of decision making.

## 5. Business and administrative costs.

For example, specific matters that the Review will examine include (but are not limited to):

- are current timeframes for consideration of applications for clearance and authorisations appropriate;
- is the methodology that the Commission uses to analyse benefits and costs under Part 5 appropriate;
- does the Act provide sufficient flexibility for the Commission to accept or vary undertakings; and
- does the Act provide adequately for the enforcement of undertakings.

Importantly, the Review will only consider improvements to processes and procedures and will not include consideration of the thresholds in Part 2 and 3, which set the line in the sand beyond which a firm should apply for authorisation or clearance. The Part 2 and 3 thresholds for business acquisitions and restrictive trade practices were substantively amended in 2001.

### **Proposed Approach for Review**

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The Review of the Authorisation and Clearance Provisions of the Commerce Act will require a whole-of-government process led by the Ministry of Economic Development, in consultation with 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 the Authorisation and Clearance Provisions of the Commerce Act.

<b>Preparation of discussion document</b> MED to draft discussion document for public release in consultation with: <ul style="list-style-type: none"><li>• 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</li><li>• targeted stakeholders through an 'advisory group' process.</li></ul>	Approx 2 months  January 2007 – March 2007
<b>Cabinet approval to release discussion document</b>  Seek Cabinet approval for the full public release of the discussion document.	Approx 1 month  End March 2007
<b>Consultation on discussion document</b>  Discussion document posted on Ministry of Economic Development website for 3 month public consultation period. Release announced by the Minister of Commerce.	3 months  April 2007 – July 2007
<b>Policy recommendations</b> <ul style="list-style-type: none"><li>• Submissions considered;</li><li>• Policy recommendations decided in consultation with departments and stakeholders as required;</li><li>• Policy recommendations provided to the Minister of Commerce.</li></ul>	Approx 2 Months  July 2007 – August 2007
<b>Proposals for Cabinet Approval</b>	September 2007