

REGULATORY IMPACT STATEMENT

EXECUTIVE SUMMARY

- 1 The objective of the Review of the Authorisation and Clearance Provisions of the Commerce Act is to improve the effectiveness and efficiency of the authorisation and clearance processes. Three issues have been identified as suitable for inclusion in the Regulatory Improvement Omnibus Bill.⁵ The following amendments are being considered:
 - Providing for the enforcement of undertakings that have been approved as part of a merger clearance or authorisation application;
 - Allowing the Commission to approve variations of undertakings; and
 - Remove the 20 day statutory timeframe within which the Commission is required to hold a conference.

ADEQUACY STATEMENT

- 2 The Ministry of Economic Development has reviewed the RIS and considers that the RIS is adequate according to the adequacy criteria.

STATUS QUO AND PROBLEM

- 3 The objective of the review is to test whether some possible changes to Part 5 of the Commerce Act could improve the effectiveness and efficiency of the authorisation and clearance systems. The following issues have been identified:

Weak enforcement provisions for section 69A undertakings to divest assets or shares

- 4 The inability of the Commission to separately enforce undertakings given under section 69A is unsatisfactory. Weak enforcement provisions provide an opportunity for parties to game the legal system as they can consummate a merger that was approved based on an undertaking, and later advise the Commission that they tried to dispose of the relevant shares or assets but were unable to find a buyer that was prepared to pay a reasonable price. This means that a merger would have occurred that the Commission may have otherwise declined if it were not for the undertaking. There has only been one example in recent years where a divestment deed to undertaking was not given effect to. While the magnitude of the problem is small there is an opportunity to improve the effectiveness of the status quo.

⁵ Note that proposals on the more substantial issues arising from the Review will be presented to the Minister of the Commerce by June 2008.

Inefficient processes

- 5 The Commission does not have the ability to amend an undertaking once a merger clearance or authorisation decision has been made. This can mean that the acquirer will lose the protection provided by the approval if it does not implement the merger strictly in accordance with the approved undertaking. Thus, immunity from legal challenge by a third party would be lost even if a variation involved only minor changes that had no bearing on competition.
- 6 Section 62 of the Act provides time limits within which the Commission would be required to hold a conference following the release of its draft determination for restrictive trade practice authorisation proceedings. The process is inconsistent with the timing for merger authorisations. This lack of consistency between the two processes can be problematic when an application has both merger and trade practice implications, as it can be difficult to operate the procedures in parallel.

OBJECTIVE

- 7 The objective of the review is to provide for a regulatory regime that provides clarity, certainty and transparency of decision making, encourages participation of interested parties and timeliness of decisions, and reduces business and administrative costs.

ALTERNATIVE OPTIONS

- 8 The retention of the status quo in each case is unlikely to result in significant harm and were considered as viable options. However, on balance, the preferred options present an opportunity to improve the efficiency and effectiveness of the authorisation and clearance processes and are unlikely to result in additional costs to government, businesses and society.

PREFERRED OPTION

- 9 The following options were identified to address the problems outlined above.

Providing for the enforcement of undertakings that have been approved as part of a merger clearance or authorisation application

- 10 It is proposed to allow for the Commission to apply to the High Court to enforce undertakings given under section 69A to divest assets or shares if the Commission can show that the parties failed to comply with the undertaking. The objective of the proposal is to provide a strong incentive to comply with undertakings and reduce the administrative burden of enforcement.

Analysis

- 11 The proposed option strengthens the current incentives for firms to comply with an undertaking and will reduce the risk of potential gaming. It will also reduce the costs and improve the timeliness of enforcing undertakings and will enable the Commission to have greater confidence in accepting undertakings

offered. This amendment is also consistent with other jurisdictions such as Australia, that provide for the separate enforcement of undertakings.⁶

- 12 As a general rule, law that includes provisions that cannot be easily enforced is unsatisfactory and ineffective. A requirement on the Commission to demonstrate to the Court that one or more orders should be made is also sound from a transparency and accountability perspective.
- 13 Under this option the affected parties would not be able to put forward the defence that the merger did not breach section 47 of the Commerce Act 1986 as the question for the court will be whether the parties complied with the agreed undertaking only. One submission identified the risk that the Commission may apply to the Court to enforce an undertaking in cases where non compliance has not led to an adverse effect on competition.
- 14 The risk outlined above is small. The Commission is unlikely to make an order to the Court to enforce an undertaking for an activity that clearly does not raise competition concerns. The proposal (outlined below) to provide for the Commission to accept minor variations to an undertaking will also alleviate this risk.

Allowing the Commission to approve minor variations of undertakings

- 15 It is proposed to amend the Act to allow the original applicant to seek a variation to an approved undertaking to divest shares or assets as part of a merger clearance or authorisation application. The Commission would be able to approve the variation if it were considered that the variation was minor or would not otherwise defeat the original decision, or the competition or public benefit objectives of the Act.

Analysis

- 16 Presently, an applicant who decides that compliance with an approved undertaking may be unnecessary or counterproductive has three choices. It could comply with the undertaking in full, although this may result in assets being divested unnecessarily. It could carry out a variation to the undertaking with the knowledge that the protection of the Commission's approval will not apply. This option does not rate well from a business or legal certainty standpoint. Lastly, the applicant could re-apply to the Commission for a clearance or authorisation with the proposed revised terms. This option rates poorly in terms of timeliness and cost effectiveness for a firm, and poorly in terms of the efficient use of the Commission's limited resources. Greater flexibility would provide the opportunity for minor variations to be made without losing the original protection.
- 17 The ability to vary undertakings after the event may encourage parties to make spurious applications in the hope that it will be impractical to sell the assets by the time the Commission has made a decision. This risk is

⁶ Note that the Australian Trade Practices Act provides for the enforcement of a wider range undertaking than is being proposed here.

considered to be minimal as long as the undertakings could be enforceable through correction, punitive and compensatory orders.

Removing the statutory timeframes for holding conferences for restrictive trade practice authorisation proceedings

- 18 It is proposed to remove the 20 day time limit within which the Commission would be required to hold a conference following a request for a conference to be held.

Analysis

- 19 The current timeframe is arbitrary, unnecessary and does not serve any purpose. There is a lack of consistency between the timeframes for the merger authorisation process (there are no interim timeframes within the merger authorisation process) and this can be problematic when both processes must be considered as part of one application.

Implementation and review

- 20 These amendments will be implemented through the Regulatory Improvement Omnibus Bill and will require changes to the Commerce Act. The Ministry of Economic Development is responsible for reviewing the effectiveness of the Commerce Act.

CONSULTATION

- 21 A discussion document on the authorisation and clearance provisions within the Commerce Act was published and 33 submissions on the issues raised within this document were received. Officials have also consulted with the Treasury, the Commerce Commission and the Ministry of Justice regarding the administrative and low level policy issues within the Part 5 review that are proposed to be progressed through the QRR. The majority of the submissions supported the proposals.