



## COVERSHEET

<b>Minister</b>	Hon Kris Faafoi	<b>Portfolio</b>	Commerce and Consumer Affairs
<b>Title of Cabinet paper</b>	Review of Section 36 of the Commerce Act and Other Matters: Policy Decisions	<b>Date to be published</b>	18 February 2020

<b>List of documents that have been proactively released</b>		
<b>Date</b>	<b>Title</b>	<b>Author</b>
18 February 2020	Review of Section 36 of the Commerce Act and Other Matters: Policy Decisions	Office of Hon Kris Faafoi
18 February 2020	Cabinet Economic Development Committee Minute of decision: Review of Section 36 of the Commerce Act and Other Matters: Policy Decisions	Cabinet Office
18 February 2020	Impact Statement: Review of Section 36 of the Commerce Act and other matters	MBIE

### **Information redacted**

### **YES / NO**

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Some information has been withheld for the reasons of confidentiality of advice to Government and that the making available of that information would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand.



# Cabinet Economic Development Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Review of Section 36 of the Commerce Act 1986 and Other Matters: Policy Decisions

**Portfolio** Commerce and Consumer Affairs

On 12 February 2020, the Cabinet Economic Development Committee (DEV):

#### Background

- 1 **noted** that on 5 September 2018, DEV:
  - 1.1 agreed to the release of a discussion document on proposed changes to the Commerce Act 1986, namely to strengthen the prohibition against anti-competitive unilateral conduct (section 36), repeal the Act's intellectual property provisions, and make technical changes relating to covenants;
  - 1.2 invited the Minister of Commerce and Consumer Affairs to report back on the outcome of consultation and with any proposed policy changes;

[DEV-18-MIN-0172]

#### Section 36

- 2 **noted** that 23 submissions were received on the issue of section 36 of the Commerce Act, with stakeholders relatively evenly divided between being for, against, or neutral towards reform;
- 3 **agreed** to amend section 36 of the Commerce Act to prohibit persons with a substantial degree of power in a market from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market;
- 4 **agreed** that authorisation from the Commerce Commission be available for conduct which may breach section 36 of the Commerce Act, but which is ultimately in the public interest;

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International relations

#### Intellectual property

- 6 **noted** that 14 submissions were received on the issue of repealing the safe harbours for intellectual property, with most stakeholders either neutral or opposed to reform;

- 7 **agreed** to repeal the safe harbours for intellectual property in sections 45, 36(3), and 7(2) of the Commerce Act, and in section 7(3) to the extent that it relates to intellectual property;
- 8 **invited** the Minister of Commerce and Consumer Affairs to invite the Commerce Commission to prepare guidelines on its enforcement approach in relation to intellectual property under the Commerce Act once amended;

### Other matters

- 9 **agreed** to prohibit covenants that create or implement a cartel, in the same way as contracts;
- 10 **agreed** to amend the Commerce Act to clarify that the Act's provisions relating to anti-competitive conduct apply to interests in land, without substantively extending the Act's scope;
- 11 **agreed** to increase the maximum pecuniary penalties for anti-competitive mergers to align with those relating to anti-competitive agreements contained in section 80 of the Commerce Act 1986;
- 12 **agreed** to increase the maximum number of Commerce Commissioners from six to eight;
- 13 **agreed** to amend the Commerce Act to provide that the Commerce Commission may share information that it holds in relation to its functions under the Act, or any other Act that it enforces, with other government agencies or regulators, subject to safeguards relating to the use and storage of that information;

### Legislative implications

- 14 **agreed** to give effect to the above proposals through a Commerce Amendment Bill;
- 15 **noted** that a **Confidential advice to** [redacted] **is being sought on the 2020 Legislation Programme** **Confidential advice to Government** [redacted];
- 16 **invited** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;
- 17 **authorised** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes, consistent with the policy intent of the paper under DEV-19-SUB-0007, on issues that arise during the drafting process.

Jack Petterson  
Committee Secretary

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**Hard-copy distribution: (see over)**

**Present:**

Hon Kelvin Davis  
Hon Phil Twyford  
Hon Dr Megan Woods (Chair)  
Hon Chris Hipkins  
Hon Stuart Nash  
Hon Iain Lees-Galloway  
Hon Jenny Salesa  
Hon Damien O'Connor  
Hon Tracey Martin  
Hon Shane Jones  
Hon Kris Faafoi  
Hon Willie Jackson  
Hon James Shaw  
Hon Julie Anne Genter  
Hon Eugenie Sage

**Officials present from:**

Office of the Prime Minister  
Officials Committee for DEV

**Hard-copy distribution:**

Minister of Commerce and Consumer Affairs

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