

Select Committee reports back on the Commerce Amendment Bill

[Tony Dellow](#), [Susie Kilty](#), [Anna Parker](#)

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On 14 September 2021, the Economic Development, Science and Innovation Committee released its report on the Commerce Amendment Bill 2021. The Committee recommended that the Bill pass, with certain amendments as set out in this article.

As a recap, the changes to the Commerce Act 1986 proposed by the Bill are set out in our [previous update](#). Those amendments include:

- Subjecting conduct by entities with substantial market power to a competition test that considers the effect of the conduct (rather than just the purpose) under section 36 of the Commerce Act
- Repealing current exceptions in the Commerce Act relating to intellectual property rights
- Increasing the maximum penalties for anti-competitive mergers
- Clarifying the application of the Commerce Act to covenants and other interests in land.

The main additional amendments proposed by the Select Committee are:

- **Aligning the rules for Trans-Tasman markets:** The Select Committee recommended subjecting entities with substantial market power in a market in Australia, or in a market in New Zealand and Australia, under section 36A to the new competition test proposed under section 36. The purpose of this amendment would be to avoid double standards based on where an entity has substantial market power.
- **Criminal offences for cartel provisions in covenants:** To achieve consistency between the provisions for contracts and covenants, the Select Committee recommended making it a criminal offence to contravene the Bill's prohibition on cartel provisions in covenants.
- **Expanding the Commerce Commission's powers to grant authorisation:**
 - **provisional authorisation:** The Select Committee acknowledged that COVID-19 has demonstrated that there may be compelling public interest reasons to grant provisional authorisation. The Commission's ability to issue provisional authorisation is temporary under the COVID-19 Response (Further Management Measures) Legislation Act 2020, but the Select Committee recommended that it should be made permanent to improve the Commerce Act's administration.
 - **authorising cartel conduct:** The Bill already proposes to expand the Commission's powers to authorise conduct covered by section 36. The Select Committee recommends including conduct prohibited by section 36A and allowing the Commission to directly authorise any cartel conduct prohibited by section 30.

The Bill is now awaiting its Second Reading in Parliament. If you have any questions about how the upcoming changes may affect you, please contact a member of our [competition law team](#).

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659

