

10 March 2021

Revision Programme Team
Parliamentary Counsel Office
Wellington

By email: contact@pco.govt.nz

Tēnā koe

Re: Proposed Statutes Revision Programme 2021-2023 – consultation

The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the proposed revision programme for 2021-2023. The Parliamentary Counsel Office (**PCO**) is seeking feedback on whether submitters support the proposed list of revision Bills. The Law Society's comments focus solely on the proposed revision of the Commerce Act 1986.

Overview

The Law Society supports the objective of the revision programme undertaken under Subpart 3 of Part 2 of the Legislation Act 2012 to improve access to and clarity of the New Zealand statute book.

The PCO website notes the “draft programme focuses on revising individual or smaller groupings of Acts, in contrast with the previous programmes”. It also notes that “revising an Act means rewriting it in clearer, up-to-date language, and in a modern drafting style and structure, to make it more accessible, readable, and easier to understand. The process can change the layout and the wording of the legislation, but not its substantive legal effect.”

Included in the draft list for 2021-2023 is the Commerce Act 1986 (**Act**). The reasons for the proposed revision are stated as:

- the Act has been heavily-amended and repealed
- it applies widely and of interest to consumers
- to reduce complexity
- to improve accessibility.

The Law Society has consulted experienced commercial litigators on its committees and their consistent feedback is that the Act should not be included in the revision programme, at least insofar as it may be intended to rewrite key provisions of the Act. The primary concern is that the Act uses inherently technical and sometimes non-intuitive concepts. Attempting to rewrite the legislation to make it more accessible could well generate new sources of uncertainty (and therefore litigation). The section numbering bears the hallmarks of a statute that has been repeatedly amended, but the advantages of tidying up the numbering in terms of accessibility are likely to be modest. Benefits of this kind must be weighed against the costs of requiring those who work in this specialised area to familiarise themselves with new structures, nomenclatures and numbering systems.

More detailed comments are set out below.

Commerce Act 1986

While the Act applies widely and is of interest to consumers in the sense that it affects them, it applies most commonly to larger businesses that can be expected to seek specialised advice on how it applies. Many parts of the Act are already drafted in a way that is sufficiently accessible, given the subject matter, including as a result of more recent amendments.

For example, the provisions on contracts (etc) substantially lessening competition (sections 27 and 28), taking advantage of market power (section 36), resale price maintenance (sections 37-39), and business acquisitions (Part 3), are already drafted in reasonably straightforward language. These parts of the Act have also been heavily litigated and much of the law is now fairly well settled. Revising the language could generate new uncertainty and fresh rounds of litigation.

The provisions for competition studies in Part 3A are also drafted in reasonably clear language.

On the other hand, the provisions for regulated goods and services in Part 4 (regulation of electricity lines services, gas pipeline services, airport services) and Part 5 (clearances and authorisations) are highly technical.

Many of the more important provisions in the Act were amended or replaced in recent times, when modern drafting conventions were in place. These include the cartel provisions (sections 30-33, which were amended in 2017) and Part 4 (parts of which were replaced in 2008 and other parts in 2018).

Therefore, there are real limits on the extent to which the accessibility of the Act can be materially improved by rewriting it. Accessibility is improved more meaningfully, in our view, by initiatives such as the plain English guidance published by the Commerce Commission. There are also merger guidelines, authorisation guidelines, numerous merger and investigation decisions and practical/guidance notes on specific topics. The Commission's website also includes an accessible overview of the relevant rules. Any changes to the wording of the Act are likely to attract close scrutiny, particularly from the larger businesses whose activities are most directly regulated by it.

For these reasons, the Law Society considers there is significantly less value in a revision of this Act than older statutes or statutes of wider general application (such as the first revision Bill to be enacted, which is now the Contract and Commercial Law Act 2017). The Law Society acknowledges that the section numbering could be tidied up, but questions whether the benefits of this would outweigh the costs. The Law Society therefore recommends that the Act not be included in the 2021-2023 revision programme.

Next steps

We hope these comments are helpful. If you have any questions or further discussion would assist, please contact the Law Society's Law Reform and Advocacy Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz).

Nāku noa nā,



Herman Visagie
NZLS Vice-President