

29 April 2020

[REDACTED]

By email only: [REDACTED]

### Official Information Act #19.155

1. Thank you for copying the Commerce Commission (Commission) into your letter of 29 March 2020 (received 30 March 2020) to the Minister of Commerce and Consumer Affairs expressing concern about the ability of the Commission to perform its statutory functions following the Minister's policy statement.
2. The primary purpose of our letter is to respond to the Official Information Act 1982 (OIA) request contained in your letter.
3. However, for completeness, we note that the Minister's policy statement was issued under section 26 of the Commerce Act 1986 (the Act) and was published in the New Zealand Gazette<sup>1</sup> as required by that section. We confirm that the Commission is continuing to exercise its powers independently under the Act having regard to the Minister's policy statement as required by section 26 of the Act.
4. We also note that the New Zealand High Court has previously ruled on what it means to "have regard to" a statement under section 26 of the Act. *In New Zealand Co-op Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601 the Court said:

We do not think there is any magic in the words 'have regard to'. They mean no more than they say. The [Commission] may not ignore the statement. It must be given genuine attention and thought, and such weight as the [Commission] considers appropriate. But having done that the [Commission] is entitled to conclude it is not of sufficient significance either alone or together with other matters to outweigh other contrary considerations which it must take into account in accordance with its statutory function [cite deleted]. In the end, however weighty the statement may be as an expression of considered Government policy, it does not have any legislative effect to vary the nature of the duties which the [Commission] must carry out.

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<sup>1</sup> <https://gazette.govt.nz/notice/id/2020-go1374>

## Urgency

5. We note your letter of 29 March 2020 states that your request is urgent. Section 12(3) of the OIA provides that reason(s) shall be given where information is sought on an urgent basis. This is to allow the Commission to assess whether the request should be accorded priority over other work, including other OIA requests.<sup>2</sup>
6. Our email of 1 April 2020 requested the reason(s) for seeking the information urgently, so that we could assess your request. We note we have not received a response to that request.

## Minister's Statement

7. You have asked for all documents (to be interpreted broadly) concerning or in any way connected to the Minister's statement, whether held by the Minister or the Commerce Commission, and including any correspondence, briefings, records of conversations, memoranda, draft directions, economic or other analysis, etc.
8. On 9 April 2020, we advised you that we have transferred part of this request to the Office of Hon Kris Faafoi MP and to the Ministry of Business Innovation and Employment (MBIE). The transfer covers communications between the Commission and the Minister's office and/or MBIE concerning or in any way connected to the Minister's statement. The Commission's response is limited therefore to our internal documents and communications on or connected to the Minister's statement.
9. We have searched our document management system, email server and unified communications platform (instant messaging, telephone and video conferencing) for documents that may be relevant to your request. We are in the process of reviewing these documents.
10. We are prioritising this review to the extent possible without unreasonably interfering with the operations of the Commission including, for instance, transferring an individual from another role to assist the OIA team with its review of the documents to speed up the process. However, we do not consider we will be able to complete this exercise within the original timeframe, by 30 April 2020.
11. The Commission can in certain circumstances extend the time limit for making a decision on a request for information, under section 15A(1) of the OIA. We will be extending the deadline to decide this part of your request to **12 June 2020**. If the Commission is able to provide the requested information before this date, we will do so.
12. The reason for the extension of time is that the request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations

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<sup>2</sup> Office of the Ombudsman Guidance: *The OIA for Ministers and agencies* at page 24.

of the Commission, under section 15A(1)(b) of the OIA. It may also be that consultations are required following review (section 15A(1)(a) of the OIA).

13. If there is certain information [REDACTED] wishes to receive as a priority, please contact us to discuss how we might be able to accommodate this.

#### **Information submitted to the Commission**

14. You have asked for any information or documentation submitted to the Minister and/or the Commission by any business or organisation concerning any need or desire to relax or suspend or otherwise interfere with the strictures of the Act.
15. The Commission has received enquiries from industries and/or businesses seeking to understand how they may collaborate in response to COVID-19. It has received these enquires both before and after the Minister's government policy statement was transmitted to the Commission and the Commission issued its media statement advising that it had no intention of taking enforcement action under the Act against businesses that are cooperating to ensure New Zealanders continue to be supplied with essential goods and services at this time.
16. We are withholding these enquiries under section 9(2)(b)(ii) and (ba)(i) of the OIA due to the commercially sensitive nature of the matters under consideration. Were it necessary to do so, in relation to some enquiries the Commission could have withheld them under sections 9(2)(d) and (e) of the OIA, and in once case under section 9(2)(c) of the OIA.
17. These are unprecedented circumstances, and businesses are working through their options for assuring the supply of goods and services. We do not consider that it would be in the public interest to disclose this information as it is likely to unreasonably prejudice the commercial position of those parties that supplied that information and that are the subject of the information.
18. We also consider that it likely to prejudice the supply of similar information in the future, and that it is the public interest that such information should continue to be supplied. We consider that it is important that at this time industries and businesses are able to seek advice from the Commission about any proposals for collaboration, especially since these proposals may not ultimately be implemented.
19. Further if businesses do not approach the Commission, then the Commission may remain unaware of any agreements reached, which increases the risk of such agreements harming the interests of New Zealand consumers.
20. However, we are able to provide a summary of the nature of the requests that we have received and the advice that we have provided under section 16(e) of the OIA. These enquiries have mostly concerned how businesses may ensure the supply of essential goods and services to consumers or implement government policy. The Commission has provided the following advice to industries and/or businesses in response to these enquiries:

- 20.1 The Commission had interpreted the Minister's policy statement as only covering collaboration relating to the provision of essential goods and services that is necessary to respond to the COVID-19 pandemic. Businesses should continue to turn their mind to what decisions they can reach independently (for example, some companies have made unilateral decisions to waive penalty fees for consumers).
- 20.2 The Commission made it clear in its media statement following the release of the section 26 statement that it will not tolerate unscrupulous businesses using COVID-19 as an excuse for non-essential collusion or anti-competitive behaviour.
- 20.3 Participants need to consider:
- 20.3.1 the consumer benefits of the collaboration;
  - 20.3.2 the extent of information sharing and the type of information being shared, for example the Commission has indicated that it would not expect businesses to be sharing additional information around future prices or future promotions;
  - 20.3.3 the scope and duration of the collaboration;
  - 20.3.4 how they intend to keep the collaboration under review to determine when the parties are in a position to bring the collaboration to an end; and
  - 20.3.5 a process for review once the collaboration has ended.
21. We have also indicated that we understand industry participants and Government want to ensure that consumers are being provided with timely and consistent messaging about the supply of essential goods and services, and that there may be real public benefit in this.
22. The Commission considers that, having provided the summary above, the good reasons that exist for withholding the requested information are not outweighed by any other considerations which render it desirable, in the public interest, to make that information available (section 9(1) of the OIA).

### **Further information**

23. If you are not satisfied with the Commission's response to your OIA request, section 28(3) of the OIA provides you with the right to ask an Ombudsman to investigate and review this response. However, we would welcome the opportunity to discuss any concerns with you first.

24. Please note the Commission will be publishing this response to your request in the Official Information Act register on our website.<sup>3</sup>
25. Please do not hesitate to contact us at [uia@comcom.govt.nz](mailto:uia@comcom.govt.nz) if you have any questions about this request.

Yours sincerely

*Mary Sheppard*  
OIA Coordinator

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<sup>3</sup> <https://comcom.govt.nz/about-us/requesting-official-information/ia-register>