# Fair Trading (International Co-operation) Amendment Act 2012

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| Public Act | 2012 No 86 |
| Date of assent | 23 October 2012 |
| Commencement | see section 2 |

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**The Parliament of New Zealand enacts as follows:**

### 1 Title

This Act is the Fair Trading (International Co-operation) Amendment Act 2012.

### 2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

### 3 Principal Act amended

This Act amends the Fair Trading Act 1986.

### 4 Power to search

Section 47 is amended by adding the following subsection:

"(4) For the purpose of allowing the Commission to provide, under section 48I, compulsorily acquired information and investigative assistance to a recognised overseas regulator, every reference in this section to a contravention of this Act must be taken to include a reference to a contravention of any foreign enactment that is identified (as required by section 48G(1)(b)) in the co-operation arrangement concerning that recognised overseas regulator."

### 5 New sections 48B to 48O inserted

The following sections are inserted after section 48A:

"**48B Purpose of sections 48C to 48O (which relate to assistance to overseas regulators)**

The purpose of sections 48C to 48O is—

"(a) to provide for when and how the Commission may provide compulsorily acquired information and investigative assistance to overseas regulators; and

"(b) to clarify other matters relating to sharing other kinds of information with overseas regulators.

"**48C Definitions of terms used in sections 48B to 48O**

In sections 48B to 48O, unless the context otherwise requires,—

"**co-operation arrangement** means an arrangement concerning the Commission and an overseas regulator that is entered into under section 48E (a government-to-government co-operation arrangement) or section 48F (a regulator-to-regulator co-operation arrangement) for—

"(a) the provision by the Commission of compulsorily acquired information and investigative assistance to the overseas regulator; and

"(b) the provision by the overseas regulator of information and investigative assistance to the Commission

"**compulsorily acquired information** means information that—

"(a) is acquired by the Commission, whether before or after this section comes into force, as a result of, or in relation to, the exercise by the Commission of any of its powers under section 47 or 47G, or any power incidental to those powers; and

"(b) is not in the public domain

"**investigative assistance** includes providing assistance by way of exercising any power of the Commission under, or in relation to, section 47 or 47G, and any powers incidental to those powers

"**overseas regulator** means an overseas body that has fair trading law functions corresponding to those of the Commission under this Act

"**recognised overseas regulator** means an overseas regulator that is the subject of a co-operation arrangement.

"**48D Restrictions on providing compulsorily acquired information and investigative assistance**

The Commission must not provide compulsorily acquired information or investigative assistance to an overseas regulator unless the information or assistance is provided—

"(a) to a recognised overseas regulator in accordance with a co-operation arrangement; and

"(b) in accordance with sections 48I to 48K.

"**48E Government-to-government co-operation arrangements**

"(1) The Minister may, on behalf of the Government of New Zealand, enter into a co-operation arrangement concerning an overseas regulator with—

"(a) the government of the country in which the overseas regulator is established; or

"(b) if the overseas regulator is established by an international body, the governing body of that international body.

"(2) Before entering into a co-operation arrangement concerning an overseas regulator, the Minister must—

"(a) have regard to the legal framework relating to the use of compulsorily acquired information in the jurisdiction of the overseas regulator; and

"(b) have regard to the potential consequences for New Zealand consumers and businesses of providing compulsorily acquired information or investigative assistance to the overseas regulator; and

"(c) consult with the Privacy Commissioner on any privacy issues arising from the proposed co-operation arrangement.

"(3) The Minister must not enter into a co-operation arrangement unless he or she is satisfied that entering into the arrangement is not inconsistent with any of New Zealand's obligations under international agreements, conventions, or treaties.

"**48F Regulator-to-regulator co-operation arrangements**

"(1) The Commission may, with the prior written approval of the Minister, enter into a co-operation arrangement with an overseas regulator.

"(2) The Minister may not give approval to a co-operation arrangement under this section unless the Minister—

"(a) has had regard to the matters specified in section 48E(2)(a) and (b) and has consulted as specified in section 48E(2)(c); and

"(b) is satisfied of the matter specified in section 48E(3).

"**48G Content of co-operation arrangements**

"(1) Every co-operation arrangement must—

"(a) identify the overseas regulator that it concerns; and

"(b) identify the foreign enactments in connection with which the recognised overseas regulator may seek compulsorily acquired information and investigative assistance from the Commission; and

"(c) set out how any compulsorily acquired information that is provided may be used by the overseas regulator, and how it is to be kept secure.

"(2) A co-operation arrangement may also—

"(a) provide for the reimbursement of the Commission for costs incurred in providing the information or assistance; and

"(b) include other conditions on the provision of compulsorily acquired information or investigative assistance.

"**48H Procedures relating to co-operation arrangements**

"(1) Every co-operation arrangement must be in writing and be signed by,—

"(a) in the case of a government-to-government co-operation arrangement entered into under section 48E, the Minister and the person occupying, with respect to the overseas regulator, an equivalent position to that of the Minister, or any other person that the relevant government or governing body considers appropriate:

"(b) in the case of a regulator-to-regulator co-operation arrangement entered into under section 48F, the chairperson of the Commission and the person occupying the equivalent position in relation to the overseas regulator.

"(2) No later than 15 working days after a co-operation arrangement is entered into,—

"(a) the Minister or the Commission, as appropriate, must publish a notice in the *Gazette* that—

"(i) states that the arrangement has been entered into; and

"(ii) identifies the overseas regulator concerned; and

"(iii) identifies the parties to the arrangement; and

"(iv) states when the arrangement comes into effect; and

"(b) the Commission must publish a copy of the co-operation arrangement on its Internet site, and must keep it there while the arrangement continues in force.

"(3) Subsections (1) and (2) apply with all necessary modifications to every amendment to a co-operation arrangement.

"**48I Providing compulsorily acquired information and investigative assistance**

"(1) Following a request by a recognised overseas regulator made in accordance with a co-operation arrangement, the Commission may do either or both of the following:

"(a) provide compulsorily acquired information to the recognised overseas regulator:

"(b) provide investigative assistance to the recognised overseas regulator.

"(2) Before providing compulsorily acquired information or investigative assistance under subsection (1), the Commission must be satisfied that—

"(a) providing the information or assistance will, or is likely to, assist the recognised overseas regulator in performing its functions or exercising its powers in relation to fair trading law; and

"(b) the provision of the information or assistance will not be inconsistent with the co-operation arrangement; and

"(c) the provision of the information or assistance will not significantly prejudice New Zealand's international trade interests.

"(3) If the Commission considers, after consultation with the Ministry of Foreign Affairs and Trade, that a request for compulsorily acquired information or investigative assistance may have

significant trade consequences for New Zealand, the Commission must refer the matter to the Minister of Trade.

"(4) If a request is referred to the Minister of Trade, the Commission is deemed to be satisfied for the purpose of subsection (2)(c) only if the Minister of Trade states, in writing, that he or she is satisfied that the provision of the information or assistance will not significantly prejudice New Zealand's international trade interests.

"(5) In considering whether to provide information or investigative assistance under a co-operation arrangement, the Commission must also consider—

"(a) whether complying with the request will substantially affect the Commission's ability to perform its other functions under this Act or any other enactment; and

"(b) whether the recognised overseas regulator could more conveniently obtain the information or assistance from another source; and

"(c) whether the request would, in the opinion of the Commission, be more appropriately dealt with under the Mutual Assistance in Criminal Matters Act 1992.

### "48J Conditions on providing compulsorily acquired information and investigative assistance

"(1) If the Commission provides compulsorily acquired information or investigative assistance to a recognised overseas regulator, the Commission may impose conditions on such provision, including conditions relating to—

"(a) maintaining the confidentiality of information; and

"(b) the storage or use of, or access to, anything provided; and

"(c) the copying, returning, or disposal of copies of anything provided; and

"(d) the payment of costs incurred by the Commission in providing anything or in otherwise complying with a request for information or investigative assistance.

"(2) The Commission must not provide compulsorily acquired information that was given by a person whom the information might tend to incriminate unless the recognised overseas regulator gives a written undertaking—

"(a) that it will not use the information as evidence—

"(i) in criminal proceedings against the person (other than in proceedings in respect of the falsity of the person's testimony); or

"(ii) in proceedings against the person for a pecuniary penalty or any equivalent proceedings; and

"(b) that, to the extent that it is within the ability of the overseas regulator to do so, it will ensure that the information is not used by any other person, authority, or agency as evidence in proceedings referred to in paragraph (a).

"**48K Notice to persons affected by provision of information**

"(1) If the Commission provides any compulsorily acquired information to a recognised overseas regulator, the Commission must, as soon as practicable after providing the information, notify the following people that the information has been provided:

"(a) the person from whom the information was acquired:

"(b) every person to whom the information relates.

"(2) However, the Commission need not notify a person as required by subsection (1) if—

"(a) giving notice might compromise any investigation conducted, or to be conducted, by the Commission or any overseas regulator; or

"(b) giving notice would prejudice the maintenance of the law (including the prevention, investigation, and detection of offences, and the right to a fair trial) in New Zealand or elsewhere; or

"(c) it is not practicable in the circumstances to give notice to the person.

"**48L Reporting on use of co-operation arrangements**

The Commission's annual report must report on the use and operation of co-operation arrangements during the period covered by the report, and include information on—

"(a) the number and general nature of requests for information and investigative assistance received from recognised overseas regulators; and

"(b) the number and general nature of requests for information and investigative assistance that the Commission has made to recognised overseas regulators.

"**48M Sharing of non-compulsorily acquired information not affected**

Except to the extent that non-compulsorily acquired information is dealt with in a co-operation arrangement, the ability of the Commission to provide non-compulsorily acquired information to an overseas regulator is not affected by—

"(a) sections 48B to 48L; or

"(b) whether or not the overseas regulator is a recognised overseas regulator.

"**48N Information provided by consent**

Nothing in sections 48B to 48L or any co-operation arrangement prevents the Commission providing any information to an overseas regulator with the consent of the person who is the subject of the information.

"**48O Maintenance of privilege**

"(1) If the Commission provides to an overseas regulator, for the purpose of assisting the overseas regulator to perform its fair trading law functions, a communication or information in respect of which the Commission has any privilege referred to in section 54, 56, or 57 of the Evidence Act 2006, the Commission is not to be taken as having waived its privilege in relation to that communication or information merely by providing it to the overseas regulator.

"(2) If the Commission receives from an overseas regulator, for the purpose of assisting the Commission to perform its fair trading law functions under this Act, a communication or information that, under the law of the country of the overseas regulator is subject to a privilege analogous to a privilege of a kind referred to in section 54, 56, or 57 of the Evidence Act 2006, that communication or information is subject to the analogous privilege in New Zealand, and the Evidence Act 2006 applies accordingly.

"(3) The Commission must not provide a communication or information that is subject to the privilege referred to in section 57 of the Evidence Act 2006 (which relates to settlement negotiation and mediation) to an overseas regulator unless every other party that has a privilege in relation to that communication or information consents to the Commission providing the communication or information to the overseas regulator.

"(4) To avoid doubt, this section applies whether or not a communication or information is provided under a co-operation arrangement."

## Legislative history

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| 31 July 2012 | Divided from Commerce Commission (International Co-operation, and Fees) Bill (Bill 293–2) by committee of the whole House as Bill 293–3C |
| 16 October 2012 | Third reading |
| 23 October 2012 | Royal assent |

This Act is administered by the Ministry of Business, Innovation and Employment.

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