

The Chair

**Cabinet Economic Growth and Infrastructure Committee**

**Block Exemption for Specified International Liner Shipping Activities in Cartels Bill**

**Proposal**

- 1 This paper seeks Cabinet agreement to introduce a targeted block exemption for specified international liner shipping activities from the prohibitions in the Commerce Act 1986 against anticompetitive agreements. This policy is to be given effect by introducing a Supplementary Order Paper (SOP) to the Commerce (Cartels and Other Matters) Amendment Bill ('the Cartels Bill') currently before the House.

**Executive Summary**

- 2 The carriage of goods by sea to and from places in New Zealand ('international shipping') is currently exempt from the prohibitions against anticompetitive arrangements in the Commerce Act 1986. In its place, an industry-specific regime dealing with unfair conduct by international carriers is provided for in the Shipping Act 1987.
- 3 At its meeting of 27 March 2013, Cabinet Economic Growth and Infrastructure Committee agreed to transfer competition regulation of international shipping to the Commerce Act over a two year transitional period. At the conclusion of that transitional period, the industry-specific regime in the Shipping Act would be repealed [EGI Min (13) 6/7, CAB Min (13) 11/5, hereinafter referred to as "the 2013 Cabinet decisions"]. This policy is reflected in the Cartels Bill as reported by the Commerce Committee.  
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- 4 The generic competition regulation approach as outlined in the Cartels Bill has been widely criticised by international carriers. This may reflect that the current Shipping Act regime provides no effective constraint on their activities and the new regime would require carriers to assess their impact on competition. However, recently New Zealand importers and exporters who are the likely beneficiaries of increased competition oversight of international shipping have raised concerns. They seek assurance that the Cartels Bill will not impede carriers from entering into efficient vessel sharing arrangements.
- 5 Given these developments, this paper seeks agreement to modify the 2013 Cabinet decisions to mitigate some of the concerns. After considering various options, I recommend introducing a targeted block exemption from the prohibitions against anticompetitive agreements in the Commerce Act for provisions of international liner shipping agreements. This will allow for coordination and sharing of vessel capacity on routes to achieve efficiencies. Agreements or provisions of agreements that, directly or indirectly, fix prices, unreasonably limit capacity, allocate markets or require sharing of commercially sensitive information about independent services provided to shippers will not be exempt.

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- 6 The Cartels Bill will continue to repeal the industry-specific regime in the Shipping Act after a two year transitional period, and the conduct of shipping lines that falls outside of the exemption (e.g. any rate making agreements) will be subject to the Commerce Act. A further provision will make clear that the exemption does not limit the Commerce Commission's ability to use its investigation powers in relation to international shipping activities.
- 7 I also seek agreement to carry out limited consultation with interested parties on the detail of the block exemption text in the course of finalising the Supplementary Order Paper and to make minor technical amendments not inconsistent with this paper.

### Transitioning International Shipping to the Commerce Act

#### *State of competition*

- 8 New Zealand is relatively well served by liner shipping operators, with 20 international container lines (including 8 of the 10 largest shipping companies) serving New Zealand's 10 container ports. In 2015, approximately 31 percent of sea trade tonnage was containerised, but this made up 73 percent of sea trade value.
- 9 Prices for shipping are the lowest they have been in some time. These low prices largely reflect a period of global downturn in the shipping industry due to surplus capacity. However there are signs of change as carriers look to cut costs through reducing routes, shedding staff, and exploring cooperation and merger arrangements.
- 10 Cooperation between carriers is a common feature of providing liner shipping services. According to the International Container Lines Committee there are currently 25 to 30 agreements that relate to sea freight services to and from New Zealand. The majority of these are operational agreements that do not fix shipping rates for providing liner shipping services to third parties. Most agreements relate to vessel sharing, space charter and slot exchange agreements. Cooperation of this sort generally leads to efficiencies and better services for customers. However, in concentrated markets, there is a risk that carriers may not pass on the full benefits to customers or that the agreements could have the effect of restricting output and raising prices.
- 11 In particular, there are still some international shipping agreements operating in relation to New Zealand that provide for a high level of information exchange between carriers, including on non-binding shipping rates and capacity for services. For example, five carriers with a combined market share of 94 percent participate in the *Australia and New Zealand – United States Discussion Agreement* covering inbound trade to the United States.<sup>1</sup> The lack of transparency on how charges are set, and historical examples of parallel price movements, are a concern for some exporters.

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Australian Competition and Consumer Commission (ACCC), Japanese Fair Trade

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<sup>1</sup> United States Federal Maritime Commission, 54<sup>th</sup> Annual Report for Fiscal Year 2015, page 33.

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Commission and the United States authorities have recently taken action against shipping companies for price fixing and output restriction.

### *Existing regulatory regime is weak*

- 13 The 2013 Cabinet decisions addressed a concern that the existing industry-specific regime in the Shipping Act provides weak competition oversight of international shipping arrangements. In particular:
  - 13.1 the exemption from the Commerce Act is very broad, extending to all arrangements for carriage of goods by sea to and from places in New Zealand, but the Shipping Act regime only applies to outward shipping and provides no protection for importers against harmful practices;
  - 13.2 the Ministry of Transport carries out investigations under the Shipping Act regime, but the Ministry has neither the standing expertise to conduct enforcement investigations nor visibility over shipping agreements. No investigations have been carried out since the Act came into force; and
  - 13.3 even if an investigation was to be carried out, there is no ability to sanction unfair conduct. At most, the Ministry could make a recommendation to the Minister of Transport and the Minister could direct carriers to provide information and undertake further negotiations with exporters. This is unlikely to act as an effective deterrent.
- 14 There is still a strong case for transitioning international shipping to the Commerce Act and oversight by the Commerce Commission. This paper does not revisit that decision.

### **Treatment of vessel sharing arrangements under the Cartels Bill**

- 15 The Commerce Act as amended by the Cartels Bill recognises that cooperation between competitors, such as vessel sharing, may be procompetitive. It makes a distinction between procompetitive cooperation and anticompetitive collusion by creating tests focused on the 'substance' of the activities. In particular, it looks at the dominant purpose of the parties in collaborating.
- 16 The relevant provisions in the Cartels Bill include:
  - 16.1 a new generic exemption from the prohibitions against anticompetitive cartels for 'collaborative activities'. Collaborative activities are activities in cooperation between would-be competitors that do not have the dominant purpose of lessening competition between them. Limitations on capacity, allocation of markets and fixing of prices are permitted if they are reasonably necessary for the purposes of that collaborative activity and are unlikely to substantially lessen competition; and
  - 16.2 a new power for the Commerce Commission to grant clearance to parties for collaborative activity arrangements. Application for clearance is voluntary. It is a means for parties to manage risk if there is any uncertainty as to how the Commerce Act would apply to their agreement.
- 17 Consistent with the overall approach of the Commerce Act, these provisions are principle-based, to cater for all classes of agreements economy-wide. There are no

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'bright lines' in the Cartels Bill to determine how the provisions would be interpreted. Businesses are responsible for determining whether they are in compliance through self-assessment or obtaining expert advice, including the option of applying for clearance from the Commerce Commission. The Commerce Commission has provided draft guidelines on the new provisions to assist with this assessment.

- 18 The international carriers are concerned that the 'collaborative activity' exemption is unique to New Zealand and would impose high compliance costs on them to assess their activities pursuant to vessel sharing agreements in order to ensure they were compliant. In order to manage risk, they consider they would need to seek clearance from the Commerce Commission for every agreement and its variation, and that this would impose significant delays and costs impacting on their operational flexibility.
- 19 While counterarguments to these points are possible, most recently these concerns have been reiterated to me by key New Zealand stakeholders who would otherwise be the beneficiaries of strengthened competition oversight of shipping agreements. In particular, the New Zealand Shippers Council wrote to me, dated 4 May 2016, outlining that, while they continue to support the Cartels Bill, they are keen to ensure that vessel sharing agreements are allowed to function efficiently and any associated compliance costs remain relatively immaterial. I consider that these stakeholders are well placed to assess the risks and benefits of these issues. Consequently, I am of the view that an amendment is necessary to alleviate concerns within the industry around the risk associated with engaging in collaborative activities once shipping is subject to the Commerce Act and to reduce the costs associated with complying with the regime.

### **Defining a block exemption – form versus substance**

- 20 Compliance costs to international carriers may be reduced by introducing a targeted block exemption specific to international liner shipping relating to activities that are unlikely to substantially lessen competition. In this way, the parties would have certainty that their procompetitive activities are immune from legal risk without having to make an assessment on a case-by-case basis. However, specifying which international liner shipping activities should be exempt and any conditions that may be imposed on those activities is a complex exercise.

### *Productivity Commission recommendation*

- 21 The Productivity Commission as part of its 2012 Inquiry into International Freight Services considered the case for a targeted block exemption for international liner shipping activities. It recommended that rate making agreements – being those that involve price fixing or limiting capacity with the intent of raising prices – should be made subject to the Commerce Act, after a suitable transitional period, given their high risk of anticompetitive detriment. However, the Productivity Commission considered that 'non-rate making agreements' should continue to benefit from a block exemption from the Commerce Act.
- 22 The Productivity Commission also recommended that the exemption for non-rate making agreements should be conditional on:
  - 22.1 filing agreements with the Ministry of Transport for placing on a public register
  - 22.2 the agreements allowing for and protecting confidential individual service contracts by parties to the agreement.

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- 23 It also recommended that the existing industry-specific regime in the Shipping Act should be retained and extended to also apply to inward shipping.

### *Concerns with Productivity Commission recommendation*

- 24 On a detailed analysis, the Productivity Commission final report is unclear on how it would define 'non-rate making' agreements for the purposes of a block exemption. There is concern that the Productivity Commission final report encourages a focus on the 'form' of the arrangements and not on the 'substance' of the activities to which the activities relate.

- 25 The main forms of agreements used in international shipping are outlined in Table 1.

**Table 1: Forms of international liner shipping agreements**

<b>Rate making agreements</b>	
Conference agreement	Between a group of ocean carriers to set rates and manage capacity on a specific trade route
Rate discussion agreement	Between a group of ocean carriers to discuss advised rate-levels and capacity management matters for a specific trade route
<b>Non-rate making agreements</b>	
Non-rate discussion agreement	Between a group of ocean carriers, which may include carriers in more than one conference and non-conference carriers, to discuss service-related and capacity management matters
Alliance agreement	Between a group of ocean carriers to jointly operate a network of vessel services
Equipment interchange agreement	Between a group of ocean carriers to jointly use and manage a pool of equipment
Cooperative working agreement	Between two or more ocean carriers regarding joint services
Sailing agreement	Between two or more ocean carriers regarding coordinated sailings
Vessel sharing agreement	Between two or more ocean carriers sharing of vessel space (space or slot charters and/or swaps)

- 26 The distinction between forms of international shipping agreements is not always straight forward. Discussion agreements have tended to replace conference agreements as a collaboration mechanism to stabilise or manage capacity. They establish (on a non-binding voluntary basis) floor rates of freight and, if applicable, surcharges and other terms and conditions in that trade. A discussion agreement will either be a rate making agreement or not depending on its terms and how it is used in practice. There are at least two discussion agreements currently in operation in New Zealand, being the Asia New Zealand Discussion Agreement (ANZDA) and the Australia and New Zealand-United States Discussion Agreement (ANZUSDA-USADA).
- 27 There are also potentially a whole range of operational agreements which may be properly considered to be non-rate making agreements. However, these agreements may be standalone or form part of overarching rate making agreements. Some vessel sharing agreements that are typically categorised as non-rate making can include provisions for setting rates. In addition, even if they do not explicitly provide for setting rates, they may include other provisions that could harm competition, such as limitations on capacity or exclusionary provisions.
- 28 Therefore, defining a block exemption based solely on the 'form' of the arrangements risks allowing for some anticompetitive activities. The Productivity Commission sought to

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address this risk by imposing conditions on non-rate making agreements in order to benefit from the block exemption from the Commerce Act, and retaining the unfair practices regime in the Shipping Act to deal with complaints. However these conditions would impose compliance costs on the parties which may exceed those that would apply under the generic 'collaborative activity' exemption already provided for in the Cartels Bill. I do not support this option.

### *Focus on liner shipping services provided jointly or in cooperation*

- 29 There are various overseas studies looking at what types of collaboration between ocean carriers is desirable to provide efficient liner shipping services that would benefit customers. Most jurisdictions allow carriers to collaborate on operational matters to achieve efficiencies in supplying jointly organised services. Combining resources in this way enables the carriers to achieve economies of scale and provide lower-cost services, enhanced frequencies and a wide variety of destinations. The European Commission block exemption for liner shipping consortia activities is an example of this.
- 30 Increasingly, jurisdictions are treating discussions between carriers which are not required for providing jointly organised services with suspicion. Previous arguments that carriers needed to discuss market conditions as a group to ensure capacity stabilisation and guard against 'destructive competition' is not supported by the evidence. In particular, the Productivity Commission reviewed international evidence following the European Commission's removal of its exemption for conference and discussion agreements, and found that those changes had not led to a material degradation in the quality of shipping services.
- 31 This international experience indicates that at its core the block exemption should focus on jointly organised services, such as vessel sharing, where cooperation results in better services than those that could be provided by each of the carriers if they operated independently. However, other discussions between carriers relating to non-binding rates and surcharges should be subject to the generic tests in the Commerce Act requiring that these activities do not substantially lessen competition.

### **Revised proposal for block exemption**

#### *Non-ratemaking liner shipping services*

- 32 I propose that that the new block exemption should cover provisions of agreements between international carriers relating to technical, operational and commercial activities for the joint supply of liner shipping services. Similar to the European Commission block exemption and the recent Hong Kong Competition Commission draft block exemption order, this would include activities such as:
- 32.1 the coordination and/or joint fixing of sailing timetables and the determination of port calls;
  - 32.2 the exchange, sale or cross-chartering of space or slots on vessels;
  - 32.3 the pooling of vessels to operate a network;
  - 32.4 the sharing or interchange of equipment, such as containers;
  - 32.5 capacity adjustments in response to fluctuations in supply and demand; and

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- 32.6 any other ancillary activity to those listed above that is reasonably necessary for the purpose of the joint supply of liner shipping services.
- 33 It excludes provisions of agreements that fix prices for supply of services to third parties, unreasonably restrict capacity, or allocate markets or customers. Provisions of agreements that include non-binding price agreements and high levels of information sharing are also excluded from the block exemption.
- 34 Limiting the conduct caught by the exemption to that which is reasonably necessary to supply cooperative joint services will ensure that the exemption promotes procompetitive behaviour. If the conduct that is exempt is expanded to include marginal conduct, such as discussion agreements, the risk of anticompetitive conduct increases.

### *Activities not covered by the exemption*

- 35 The block exemption will only apply to activities exclusively for the carriage of goods at sea to or from New Zealand. It will not cover onshore and coastal shipping activities. This is consistent with the scope of the current exemption in the Commerce Act for international shipping. While other jurisdictions such as the European Union extend its block exemption to onshore activities, I would be reluctant to extend any new exemption beyond its current scope.
- 36 In addition, the block exemption will only apply to liner shipping activities, not 'tramp services'. A tramp service is a ship that has no fixed routing or itinerary or schedule and is available at short notice or fixture to load any cargo from any port to any other port. A trumper does not require the same level of cooperation with other carriers to maintain services.
- 37 Any international shipping activities that fall outside the proposed joint liner shipping services exemption, but which are procompetitive, will continue to be able to benefit from the generic 'collaborative activities' exemption in the Cartels Bill. International carriers will also be able to apply to the Commerce Commission for clearance and authorisation for any agreements in the normal way.

### *Exemption from prohibitions against anticompetitive arrangements*

- 38 The exemption will provide that the specified activities will be exempt from the prohibitions in both sections 27 and 30 of the amended Commerce Act. These are the prohibitions against entering into a contract that substantially lessens competition and entering into or giving effect to a cartel provision. This provides full immunity to any activities subject to agreements between the carriers.
- 39 It is also considered appropriate that unilateral activities by international carriers with substantial market power should be subject to the Commerce Act (section 36). Unilateral activities by firms with substantial market power could lead to competition harms and they require a case by case assessment. International shipping mergers are currently subject to the prohibition in the Commerce Act relating to anticompetitive mergers (section 47) to the extent that the merger impacts on a New Zealand market and this should not be changed.

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### *Conditions to qualify for exemption*

- 40 Many overseas jurisdictions that provide block exemptions for international liner shipping agreements also impose conditions on those agreements. Conditions may include:
- 40.1 market share thresholds for the parties to the agreement to ensure that competition remains outside of the agreement;
  - 40.2 requirements for the agreements to allow the members to enter into confidential individual service contracts with third parties (i.e. 'open' agreements); and
  - 40.3 obligations to file the agreement with the regulator, and in some cases, for the agreement to be recorded on a public register.
- 41 The APEC Transport Working Group has recommended against using market share thresholds given the difficulties in defining the market and the uncertainty to assess compliance. Given New Zealand's small size, simple market share thresholds are poor indicators of the impact of any arrangement on competition in a market.
- 42 Obligations relating to requirements for 'non-exclusivity' are also considered to be less relevant if the block exemption is limited to the 'joint supply' of liner shipping services. In such cases, terms relating to the sharing of vessels and other assets, and conditions imposed on any party withdrawing from the agreement, are best left to the parties to determine subject to the Commerce Act in the normal way. However, the proposed block exemption should be explicit that it will not extend to any provisions in agreements that require members to share confidential information relating to any services that may be provided to third parties.
- 43 I also do not consider it necessary for the parties to file their agreements with the regulator in order to benefit from the exemption. The APEC Transport Working Group considered that a public register would improve transparency relating to international liner shipping activities. However, I consider that this would impose unnecessary costs on the parties and the regulator to administer.

### *Two year transition period*

- 44 The Cartels Bill currently provides a two year transition period before the current exemption is repealed. I consider that this transitional period is still desirable and no change is required. This will enable carriers to check their existing agreements for compliance with the new block exemption and to make amendments or seek approvals from the Commerce Commission, as required. During this transitional period, the Shipping Act regime would continue to apply.

### *Clarify the use of Commerce Commission powers*

- 45 A further amendment is desirable to clarify that, despite the exemption, the Commerce Commission can use its investigation powers under section 98 of the Commerce Act to require persons to supply information, supply documents or give evidence. This will ensure that the Commerce Commission is not restricted from investigating alleged anticompetitive conduct if it is unclear if the conduct is covered by the exemption.

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- 46 This clarification is required, as a 2009 Supreme Court decision *AstraZeneca Ltd v Commerce Commission*, found the Commerce Commission's issuing of a notice under section 98 to be invalid as the information sought would likely relate to matters covered by a Commerce Act exemption. While it is anticipated that the Commerce Commission would only use its powers where it has reasonable belief that there could be undiscovered information that relates to a contravention, this provision would limit the ability of parties to unduly impede any investigation.

### International implications

#### *The Pacific Island routes*

- 47 Shipping services relating to the Pacific Islands are generally one of two types:
- 47.1 serving the Pacific Islands en route to other major destinations outside Oceania. Eight of the top ten shipping companies currently stop at different Pacific Island countries, with a wide range of cargo carrying capacities; and
  - 47.2 shipping services to and from New Zealand that are dedicated to servicing the Pacific Islands, particularly the south-west Pacific.
- 48 The dedicated shipping services to Pacific trade routes operate with only a few carriers and thin margins, to provide essential services to Pacific Island countries. The trade routes cover long distances to a number of small ports, with vessels often carrying lopsided trade volumes. These routes are served by vessel pooling and vessel sharing arrangements.
- 49 The 2013 Cabinet decisions identified the New Zealand shipping routes to and from the Pacific Islands as potentially being most affected by transitioning to generic competition law. If carriers were required to obtain clearance or authorisation for these shipping arrangements, there was concern that the resulting compliance costs may have a significant detrimental impact. In response to these concerns, Cabinet directed officials from the Ministries of Business, Innovation and Employment, Transport and Foreign Affairs and Trade to work with carriers on the Pacific Island routes to assist their transition to the new competition regime.
- 50 The proposal for a block exemption outlined in this paper should address these concerns. Any sharing or coordination of capacity on these routes will be permitted, but any fixing of prices in relation to shipping services provided to New Zealanders will be subject to the Commerce Act.

#### *Consistency with main trading partners*

- 51 A further concern raised with the 2013 Cabinet decisions was that it would put New Zealand's competition regulation out of step with its major trading partners.
- 52 The proposal for a block exemption outlined in this paper will exempt operational agreements for joint liner shipping services similar to other comparable jurisdictions. In addition it will do so with no additional compliance costs. Increasingly overseas jurisdictions are challenging price fixing activities. The treatment of discussion agreements is an area of greatest divergence in the competition laws of countries.

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- 53 The following is a sample of the regimes in overseas jurisdictions:
- 53.1 In the United States and China, all agreements are subject to oversight by the relevant maritime regulator (not the competition regulator). These regulators have powers to investigate any agreements that may cause harm to their respective trades. The US Federal Maritime Commission and the Chinese Ministry of Transport, along with the European Commission, are arguably the most influential maritime regulatory authorities and have recently taken action against agreements that harm competition in their jurisdictions.
  - 53.2 All 28 countries in the European Union only exempt joint liner shipping services from the application of their competition law. This exemption only applies to consortia that have less than 30 per cent market share. The European Union does not exempt price fixing, unreasonable capacity restraints or market allocation.
  - 53.3 Malaysia provides for joint liner shipping services, but does not allow price fixing, recommendations for prices or sharing of confidential information by international carriers. This places limits on voluntary discussion agreements. The Hong Kong Competition Commission released a draft block exemption in September 2016 that is similarly limited to vessel sharing agreements, subject to conditions which exclude voluntary discussion agreements and other anticompetitive matters.
  - 53.4 Other countries, like Brazil, South Africa, Chile, Turkey, Russia, Vietnam and Indonesia, have no international shipping exemption from their competition laws. The Competition Commission of South Africa fined two shipping companies for price fixing in November 2015.
- 54 The proposed targeted block exemption for specific international shipping activities outlined in this paper, backed up with the generic 'collaborative activity' exemption in the Cartels Bill, will provide for similar outcomes to many of these international regimes.
- 55 Our closest trading partner, Australia has a specific liner shipping regime in Part X of its Competition and Consumer Act 2010. This regime requires agreements to be registered, subject to conditions, in order to benefit from the exemption from generic competition law. This registration regime includes conference and discussion agreements. However, the ACCC has recently successfully criminally prosecuted a Japanese carrier for price fixing in relation to an unregistered agreement.
- 56 The Australian and New Zealand Productivity Commissions in their 2012 joint report on "Strengthening trans-Tasman economic relations" recommended that "The Australian and New Zealand Governments should remove — preferably on a coordinated basis — the exemption for international shipping ratemaking agreements from legislation governing restrictive trade practices."
- 57 In 2015, an independent panel charged with a review of Australian competition policy recommended the repeal of Part X to transition international shipping to generic competition law. It also recommended that the ACCC should have the power to grant block exemptions, including for international shipping agreements that meet a minimum standard of procompetitive features. In its response, the Australian Government noted that it remained open to the recommendation.

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58 The proposed block exemption in this paper is likely to be implemented in advance of changes to the Australian regime. However, if Australia does proceed with a block exemption for international shipping, there would be potential for trans-Tasman coordination at that time and in any subsequent evaluation of the Commerce Act provisions.

### Consultation

59 The Ministry of Transport, the Treasury, the Ministry for Primary Industries, the Ministry of Foreign Affairs and Trade, the Ministry of Justice and the Commerce Commission have been consulted. The Department of Prime Minister and Cabinet was informed.

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61 I have also consulted the Minister of Transport.

62 The proposed government SOP should facilitate the passage of the Cartels Bill through its remaining stages in the House.

### *Treasury comment*

63 Treasury does not support the recommendations and prefers that shipping be subject to the Commerce Act on a similar basis to other sectors, as provided for under the current Cartels Bill. The recommendation to amend the Cartels Bill creates a risk that New Zealand businesses and consumers are exposed to anticompetitive outcomes through collusive activity. Treasury considers the onus should be on carriers to show that arrangements to share capacity or coordinate activity are not anticompetitive.

64 The Cartels Bill creates sufficient flexibility for shipping lines to structure collaboration arrangements to suit their needs, providing the arrangements are procompetitive. The regime was designed so that businesses can self-assess the need to obtain clearance or authorisation, leaving considerable implementation flexibility. Treasury acknowledges that compliance costs are likely to increase and that the lack of transparency around existing arrangements makes it difficult to predict how many agreements may require clearance or authorisation. The Treasury nevertheless considers that the risk (of these costs outweighing likely benefits to New Zealanders from greater ongoing competitiveness and efficiency) is low. Officials are not aware of overseas jurisdictions experiencing declines in capacity following removal of general competition law exemptions. A transition period and the publication of guidelines by the Commerce Commission, as is standard practice in overseas jurisdictions, would provide extra reassurance.

### *Commerce Commission comment*

65 The Commerce Commission confirms its view that, as outlined in its submission to the Commerce Committee in its consideration of the Cartels Bill, the Commerce Act is sufficiently flexible to deal with issues in international shipping agreements. The Commerce Commission supports transitioning these industries to a competition regime that is governed by the Commerce Act 1986. While the Commerce Commission does not support a block exemption for international liner shipping, if it is to be adopted, the block exemption should be sufficiently detailed to ensure that it only exempts procompetitive activities.

## Financial Implications

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]. The impact of a new block exemption on these activities is likely to be low. Any financial implications arising from the proposals in this paper will be met within existing appropriations.

## Human Rights

67 The proposals in this paper are not inconsistent with the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993.

## Legislative Implications

68 The Commerce (Cartels and Other Matters) Amendment Bill is currently awaiting Committee of the Whole. The proposal outlined in the paper would be given effect by tabling a SOP to that Bill.

69 [ ]. Parliamentary Counsel Office and the Legislation Design and Advisory Committee have been informed of this proposal.

## Regulatory Impact Analysis

70 The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) is attached.

71 The Regulatory Impact Analysis Team at the Treasury (RIAT) has reviewed the RIS prepared by the Ministry of Business, Innovation and Employment and considers it **meets** the QA criteria.

72 RIAT notes that the preferred option of MBIE officials outlined in the RIS differs from the policy recommendations in this Cabinet paper. Both options are analysed in the RIS. The trade-off between options relates to the risk that the compliance costs of officials' preferred option (subjecting shipping to generic competition law without exemption in primary legislation, estimated at \$1-4 million) may outweigh any procompetitive benefits to the economy of subjecting vessel-sharing agreements to regulatory scrutiny. RIAT also notes that while there has been no public consultation on the recommendation, this issue has been widely consulted and discussed at length with interested parties.

## Gender Implications and Disability Perspective

73 This paper raises no gender implications or issues from a disability perspective.

## Publicity

74 The Office of the Minister of Commerce and Consumer Affairs will manage any media releases relating to this decision. Industry dissatisfaction with the application of the Commerce Act to international shipping agreements has been covered in the media and therefore this release may attract some attention.

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### Recommendations

The Minister for Commerce and Consumer Affairs recommends that the Committee:

- 1 **Note** that, at its meeting of 27 March 2013, the Committee agreed:
  - 1.1 that the carriage of goods by sea to and from places in New Zealand should be subject to the generic competition regime under the Commerce Act 1986 after a suitable transitional period; and
  - 1.2 at the conclusion of the [two year] transitional period, the sector-specific regime covered by the Commerce Act exemption in the Shipping Act 1987 would be repealed [EGI Min (13) 6/7, CAB Min (13) 11/5 recommendation (10) refers];
- 2 **Note** that the Commerce (Cartels and Other Matters) Amendment Bill ('the Cartels Bill') as reported back from the Commerce Committee in May 2013 provides for the policy as outlined in recommendation (1);
- 3 **Note** ];
- 4 **Note** a concern among interested parties in the shipping industry that the generic Commerce Act regime may impose undue compliance costs on international carriers and limit operational flexibility for efficient vessel sharing agreements;
- 5 **Agree** to introduce a new targeted block exemption in the Commerce Act for provisions of agreements between international carriers that relates to technical, operational and commercial activities for the joint supply of liner shipping services, such as:
  - 5.1 the coordination and/or joint fixing of sailing timetables and the determination of port calls;
  - 5.2 the exchange, sale or cross-chartering of space or slots on vessels;
  - 5.3 the pooling of vessels to operate a network;
  - 5.4 the sharing or interchange of equipment, such as containers;
  - 5.5 capacity adjustments in response to fluctuations in supply and demand; and
  - 5.6 any other ancillary activity to those listed above that is reasonably necessary for the purpose of the joint supply of liner shipping services;
- 6 **Agree** that the block exemption will not apply to provisions of agreements that:
  - 6.1 directly or indirectly, fix prices, limit capacity with the purpose of raising prices, or allocate markets; or
  - 6.2 require members to share confidential information relating to any services that may be provided to third parties;
- 7 **Agree** that the block exemption will exempt the specified international liner shipping activities from the prohibitions against anticompetitive arrangements contained in sections 27 and 30 of the Commerce Act;

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- 8 **Agree** that the new block exemption should commence two years after the Cartels Bill is passed, and at the time that the sector-specific regime in the Shipping Act is repealed;
- 9 **Agree** that the Commerce Commission's investigation powers to require any person to supply information or documents or give evidence can be used despite the block exemption;
- 10 **Invite** the Minister of Commerce and Consumer Affairs to direct Parliamentary Counsel Office to draft a Supplementary Order Paper to give effect to recommendation (5 to 9);
- 11 **Agree** that the Minister of Commerce and Consumer Affairs can undertake limited consultation with interested parties on the details of the shipping block exemption text to be included in the Supplementary Order Paper;
- 12 **Agree** that the Minister of Commerce and Consumer Affairs can make minor and technical changes to the activities that are covered or excluded from the block exemption not inconsistent with this decision; and
- 13 **Agree** that, following the release of the Supplementary Order Paper, this paper can be released on the website of the Ministry of Business, Innovation and Employment.

Authorised for lodgement

Hon Paul Goldsmith  
**Minister of Commerce and Consumer Affairs**