

Office of the Minister of Commerce and Consumer Affairs
Chair, Cabinet Legislation Committee

Commerce Amendment Bill: Approval for introduction

Proposal

- 1 This paper seeks approval for the introduction of the Commerce Amendment Bill ('the Bill').

Summary of the bill

- 2 The Bill will implement Cabinet's policy decisions to amend the Commerce Act 1986 to:
 - 2.1 introduce a competition studies power for the Commerce Commission;
 - 2.2 strengthen the regulatory regime for airports; and
 - 2.3 amend alternative enforcement mechanisms.

Competition Studies

Background

- 3 A 'competition study' (previously referred to as a 'market study') is detailed research by an agency into a particular market, or markets, where there are concerns that the market could be functioning sub-optimally.
- 4 Most overseas competition authorities, including in Australia and the United Kingdom, have some form of competition studies function. This function offers competition authorities the option to investigate concerns with competition in a sector outside of the context of an investigation into specific anticompetitive behaviour or mergers.
- 5 The OECD and the New Zealand Productivity Commission have both recommended that the Commerce Commission should be provided with the power and resources to conduct competition studies.

Policy decisions

- 6 The Bill will implement the following Cabinet policy decisions on amendments to the Commerce Act [*CAB-17-MIN-0274, CAB-17-MIN-0320 and CAB-18-MIN-0027 refer*]:
 - 6.1 to amend the Commerce Act 1986 to empower the Commerce Commission to undertake competition studies at the direction of the Minister of Commerce and Consumer Affairs (the Minister) or on the Commission's own initiative;
 - 6.2 to set out in the Commerce Act 1986 a high-level principle that requires the Minister or the Commission, before initiating a competition study, to have reason to believe that a study into the provision of the relevant goods or services is likely to be in the public interest, or in the long-term interests of consumers;

- 6.3 that the Commerce Commission, in undertaking a competition study, should be able to use appropriate information gathering powers;
- 6.4 to establish a new Competition Study Inquiries appropriation of \$1.5 million per annum to fund the Commerce Commission to carry out competition studies. This appropriation would be effective from the 2018/19 financial year;
- 6.5 that as soon as possible after the Minister or the Commerce Commission has initiated a competition study, the Commerce Commission must publish a terms of reference for that study, the contents of which would include:
 - 6.5.1 the scope of the inquiry to be undertaken; and
 - 6.5.2 the date by which the Commerce Commission will publish its final report;
- 6.6 that as part of any competition study the Commerce Commission would be required to:
 - 6.6.1 release a draft of its competition study report for public consultation;
 - 6.6.2 have regard to issues raised in submissions received from interested parties in its final report; and
 - 6.6.3 publish its final report.

Airports

Background

- 7 Since 2010, the “specified airport services” of New Zealand’s three major international airports (Auckland, Wellington and Christchurch International Airports) have been regulated under Part 4 of the Commerce Act 1986 (the Act). Part 4 regulates suppliers of goods and services in markets where there is little or no competition.
- 8 The three major international airports (“the airports”) are currently subject to information disclosure regulation, the ‘lightest’ form of regulation provided for under Part 4.
- 9 The MBIE review which began in 2014 examined whether the regulatory regime for airports under Part 4 was effective in promoting the long-term interests of consumers. This followed the first price-setting event under the information disclosure regime.
- 10 It found that the information disclosure regime had largely worked in incentivising airports to promote the long-term interests of consumers in setting their prices, as two of the three airports either lowered their pricing decision or revised their disclosures following the Commission highlighting issues with these in its initial reporting. There was not a strong case for negotiate/arbitrate regulation as the uncertain benefits of this type of regulation could likely be outweighed by the delays, regulatory uncertainty and costs to airports and the government.
- 11 However, MBIE considered there could be improvements to strengthen the threat of further regulation if airports did not promote the long-term interests of consumers in the future. The proposed amendments will make it easier for the Commission to recommend and apply further regulation if the airports are not meeting the purpose of Part 4 (i.e. they

are targeting excessive profits, lack incentives to innovate and invest or improve efficiency and quality).

Policy decisions

- 12 The Bill will implement the following Cabinet policy decisions on amendments to the Commerce Act to strengthen the regulatory regime for airports [*CAB-17-MIN-0271 refers*]:
- 12.1 to amend the Commerce Act to make it clear that the Commerce Commission's summary and analysis reports following each price-setting event can comment on whether information disclosure is being effective at achieving the statutory Part 4 purpose;
 - 12.2 to remove unnecessary steps in the Commerce Act's Part 4 inquiry process for investigating the need to change the type of regulation for already-regulated airports; and
 - 12.3 to amend the Commerce Act to clarify that changes to the type of regulation for a regulated airport can be made through an Order in Council process.

Minor issues that require confirmation

- 13 There are two minor issues that require confirmation by Cabinet Legislation Committee:
- 13.1 The amendment in Paragraph 12.1 above should make it clear that the Commerce Commission's summary and analysis reporting in section 53B of the Act can comment on the effectiveness of information disclosure to all regulated suppliers (i.e. electricity distribution and transmission businesses, and gas pipeline businesses) under Part 4, not just airports. The policy intent may not be clear enough in the previous Cabinet decisions on airports. Therefore I recommend that the Committee confirm that the intention of this amendment is to apply the clarification consistently across all information disclosure-regulated suppliers.
 - 13.2 The Commission's existing information gathering powers under Part 4 (section 53ZD(e) of the Act) should also apply to the new truncated inquiry process for regulated airports. This is a consequential amendment as it is a logical extension of these existing powers which are available to all other Part 4 investigations and inquiries.

Alternative enforcement mechanisms

Background

- 14 As part of ongoing efforts to monitor and systematically review our competition laws and in response to the Productivity Commission's 2014 Inquiry into Boosting Productivity in the Services Sector, MBIE undertook a Targeted Review of the Commerce Act 1986.
- 15 The review included whether some of the Commerce Commission's alternative (to court action) enforcement mechanisms should be amended.
- 16 The Commerce Act currently includes two main alternative enforcement mechanisms for dealing with anticompetitive behaviour: negotiated settlements (agreements between the

Commerce Commission and a firm accused of anticompetitive conduct) and a 'cease-and-desist' regime (under which the Commerce Commission can seek injunction-like orders from specially appointed commissioners).

- 17 Another option for alternative enforcement is an enforceable undertaking regime. An enforceable undertaking is essentially a voluntary negotiated settlement granted special status under legislation to allow it to be immediately enforced as if it were a court decision. In the event of a breach of an undertaking, the Commerce Commission could apply to a court for an enforcement order. Parties would be free, but not obliged, to include in the undertaking an admission of breach of the Commerce Act. This is a much less onerous process than proving a breach of the settlement and is likely to incentivise greater compliance.

Policy decisions

- 18 The Bill will implement the following Cabinet policy decisions on amendments to alternative enforcement mechanisms in the Commerce Act [*CAB-17-MIN-0274 refers*]:

18.1 to repeal the Commerce Act's cease and desist regime; and

18.2 to establish an enforceable undertakings regime in the Commerce Act.

Consultation

Competition studies

- 19 The Treasury, the Ministry of Justice, the Commerce Commission, the Ministry of Foreign Affairs and Trade, the Ministry for Primary Industries and the Department of the Prime Minister and Cabinet (Policy Advisory Group) were consulted on the introduction of competition studies. The Commission supports the introduction of competition studies provided it receives sufficient funding to meet Government expectations on the scale and scope of the studies required.

Airports

- 20 The Ministry of Transport, the Commerce Commission, and the Treasury were consulted on the policy changes to strengthen the regulatory regime for airports. The Department of Prime Minister and Cabinet was informed.

Alternative enforcement mechanisms

- 21 The Treasury, the Ministry of Justice, the Ministry for Primary Industries, the Ministry of Transport, the Ministry of Foreign Affairs and Trade, and the Commerce Commission were consulted on alternative enforcement mechanisms under the Commerce Act. The Department of Prime Minister and Cabinet was informed.

- 22 During the later stages of the drafting process, an external legal advisor to MBIE raised an issue about whether enforceable undertakings might be used by parties in enforcement matters related to mergers and acquisitions. In particular, there was concern that the new mechanism could allow behavioural undertakings (a promise that the parties will or will not undertake certain conduct) to be provided for merger enforcement matters, even though only structural undertakings (to dispose of assets or shares) are currently allowed under the merger regime.

- 23 The Commission supports the proposals, but considers that enforceable undertakings should also be available in merger enforcement matters, and intends to submit to the Select Committee on this issue.
- 24 I note that while there are some merits to this approach, this is an issue that relates to the merger regime, and submitters have not had the opportunity to comment. There is an opportunity for this issue to be considered more fully at Select Committee.

Financial implications

- 25 The proposed legislative amendments to introduce competition studies have financial implications for MBIE and the Commerce Commission.
- 26 In the case of the Commerce Commission, Cabinet has agreed to establish a new dedicated appropriation of \$1.5 million per annum to fund the Commerce Commission to carry out competition studies. This appropriation would be effective from the 2018/19 financial year.
- 27 The proposed legislative amendments to strengthen the regulatory regime for airports and amend the alternative enforcement mechanisms will have no financial implications for the Crown.

Legislative implications

- 28 The proposals outlined in this paper are to be given effect in the Commerce Amendment Bill.
- 29 The Bill has a legislative priority of [REDACTED] in the 2018 Legislation Programme.

Regulatory impact analysis

- 30 A Regulatory Impact Assessment (RIA) recommending the introduction of market (competition) studies was prepared on 9 March 2017 for the original Cabinet decision [CAB-17-MIN-0274 refers]. A new or amended RIA is not required for this Bill as the option outlined in this paper was considered in that RIA (as option 2) and officials' advice is unchanged.
- 31 The Regulatory Impact Analysis Team at the Treasury (RIAT) considered that the RIA met the quality assurance criteria, though suggested that if market (competition) studies were introduced, MBIE should be involved not only in responding to the recommendations following a particular competition study, but also in formally assessing the costs and benefits arising from the procedure as a whole.
- 32 A RIA recommending the strengthening of the regulatory regime for airports was prepared on 24 May 2017 [CAB-17-MIN-0271 refers] and a RIA recommending the amendment of alternative enforcement mechanisms was prepared on 16 March 2017 [CAB-17-MIN-0274 refers]. They were provided for the original Cabinet decisions and the RIAT considered that quality assurance standards were met in both cases.
- 33 No new or amended Regulatory Impact Assessments are required for this Bill as the options outlined in this paper are considered in the previous statements and officials' advice is unchanged.

Compliance

- 34 The Bill complies with:
- 34.1 the principles of the Treaty of Waitangi;
 - 34.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 34.3 disclosure statement requirements (a copy of that statement is attached to this paper);
 - 34.4 the principles and guidelines set out in the Privacy Act 1993;
 - 34.5 relevant international standards and obligations;
 - 34.6 the LAC Guidelines on the Process and Content of Legislation (2014 edition), which are maintained by the Legislation Design and Advisory Committee.

Binding on the Crown

- 35 The Commerce Act 1986 binds the Crown to the extent it engages in trade. This Bill does not propose to amend that provision.

Associated regulations

- 36 Regulations are not required to implement the Bill.

Other instruments

- 37 The Bill does not contain any new provision empowering the making of other instruments that are deemed to be legislative and/or disallowable instruments.

Definition of Minister/department

- 38 This Bill does not create a new definition of Minister or Department.

Commencement of legislation

- 39 Part one of the Act regarding competition studies will come into force one month after the Royal Assent. The rest of the Act will come into force on the day after the date of Royal Assent.

Parliamentary stages

- 40 I intend to introduce the Bill [REDACTED] following its approval by Cabinet and, depending on availability of House time, I will move first reading during the week of 2 April 2018. The Bill should be passed by December 2018. I will propose that the Bill be referred to the Transport and Infrastructure Select Committee for consideration for a period of four months.

Publicity

- 41 I propose to issue a press release once the Bill has been introduced into the House.

42 I will also instruct MBIE to email parties with interest in the legislative amendments affecting the regulation of airports.

43 This paper will be published on the Ministry of Business, Innovation and Employment's website.

Recommendations

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

Policy proposal

1 **note** that in June 2017 the previous Government agreed to:

1.1 empower the Commerce Commission to carry out market studies at the direction of the Minister [*CAB-17-MIN-0274, CAB-17-MIN-0320 refer*];

1.2 repeal the 'cease and desist' regime in the Commerce Act [*CAB-17-MIN-0274 refers*];

1.3 empower the Commerce Commission to accept enforceable undertakings [*CAB-17-MIN-0274 refers*];

1.4 make amendments to strengthen the regulatory regime for airports under Part 4 of the Commerce Act [*CAB-17-MIN-0271 refers*];

2 **note** that in February 2018 Cabinet agreed to empower the Commerce Commission to self-initiate a market study if the Commission has reason to believe that the market study is likely to be in the public interest [*CAB-18-MIN-0027 refers*];

3 **confirm** that:

3.1 the amendment to clarify the Commerce Commission's powers under Part 4 of the Commerce Act regarding summary and analysis reporting applies to all regulated suppliers, not just airports;

3.2 the Commission's existing information gathering powers under Part 4 of the Commerce Act will also be able to apply to the new truncated inquiry process for regulated airports;

Approval of Bill

4 **agree** to the introduction of the Commerce Amendment Bill [REDACTED]

5 **agree** that the Government propose that the Commerce Amendment Bill be:

5.1 referred to the Transport and Infrastructure Select Committee;

5.2 enacted by December 2018;

6 **note** its inclusion in the Government's 2018 Legislation Programme [REDACTED]
[REDACTED]

Communication

- 7 **approve** the Ministry of Business, Innovation and Employment to publish a copy of this paper on its website;
- 8 **approve** the Minister of Commerce and Consumer Affairs to issue a press release once the Bill has been introduced into the House;
- 9 **note** the Ministry of Business, Innovation and Employment will notify parties with an interest in the airport amendments once the Committee has approved the introduction of the Bill.

Authorised for lodgement

Hon Kris Faafoi
Minister of Commerce and Consumer Affairs