Commerce Amendment Bill

Government Bill

As reported from the committee of the whole House

Key to symbols used in reprinted bill

As reported from the committee of the whole House

text inserted

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Hon Kris Faafoi

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Commerce Amendment Act **2018**.

~~**2 Commencement**~~

~~(1) **Part 1** comes into force immediately after the expiry of the 1-month period that starts on the date of Royal assent.~~

~~(2) The rest of this Act comes into force on the day after the date of Royal assent.~~

2 Commencement

This Act comes into force on the day after the date of Royal assent.

3 Principal Act

This Act amends the Commerce Act 1986 (the **principal Act**).

Part 1
Competition studies

4 New Part 3A inserted

After Part 3, insert:

Part 3A
Competition studies

48 Interpretation

In this Part, unless the context otherwise requires,—

competition report means a report prepared by the Commission under **section 51B**

competition study means a study of any factors that may affect competition for the supply or acquisition of goods or services

department means a department of the public service specified in Schedule 1 of the State Sector Act 1988

organisation means any of the following:

(a) an organisation named in Part 2 of Schedule 1 of the Ombudsmen Act 1975:

(b) an organisation named in Schedule 1 of the Official Information Act 1982:

(c) the Auditor-General.

49 Functions of Commission under this Part

The functions of the Commission under this Act include carrying out competition studies, and preparing competition reports, under this Part.

50 Commission may carry out competition study

(1) The Commission may carry out a competition study if the Commission considers it to be in the public interest to do so.

(2) Before carrying out a competition study, the Commission must, by notice in the *Gazette*,—

(a) prescribe the terms of reference for the study; and

(b) specify the date by which the Commission will make the final competition report for the study publicly available.

(3) A copy of the notice must be made publicly available.

(4) The Commission may amend the notice in the manner set out in **subsections (1) to (3)**.

(5) The Commission may revoke the notice by further notice in the *Gazette*.

51 Minister may require Commission to carry out competition study

(1) The Minister may, by notice in the *Gazette*, require the Commission to carry out a competition study if the Minister considers it to be in the public interest to do so.

(2) The notice must—

(a) prescribe the terms of reference for the study; and

(b) specify the date by which the Commission must make the final report for the study publicly available.

(3) A copy of the notice must be made publicly available.

(4) Before issuing the notice, the Minister must consult the Commission on a draft of the notice.

(5) The Minister may amend the notice in the manner set out in **subsections (1) to (4)**.

(6) The Minister, having first consulted with the Commission, may revoke the notice by further notice in the *Gazette*.

51A Competition study terms of reference

(1) The terms of reference for a competition study must—

(a) specify the goods or services, or both, to which the study relates; and

(b) describe the scope of the study.

(2) If the study is required by the Minister, the terms of reference may require the Commission to consult any of the following as part of the study:

(a) departments:

(b) organisations:

(c) persons:

(d) classes of persons.

(3) If the Commission is carrying out the study on its own initiative, the terms of reference may name any of the following that it intends to consult as part of the study:

(a) departments:

(b) organisations:

(c) persons:

(d) classes of persons.

(4) The Commission—

(a) must carry out the competition study in accordance with the terms of reference; and

(b) may exercise its discretion in relation to any ancillary matters that are related to, but not explicitly covered by, the terms of reference.

51B Preparation of competition report

(1) The Commission must prepare a competition report that records its findings from the competition study.

(1A) The Commission may make recommendations in the report but it is not required to do so.

(2) The recommendations may, without limitation, include 1 or more of the following:

(a) changes to legislation or other instruments:

(b) changes to the policies or practices of central or local government:

(c) changes to the policies or practices of a person or an organisation responsible for the oversight or regulation of a specified industry:

(d) changes to the amount or type of information made available by a person or an organisation in relation to a specified industry:

(e) that a person or an organisation research or monitor a specified matter:

(f) that persons within a specified industry change their behaviour.

51C Consultation on draft competition report

(1) Before a competition report is finalised, the Commission must—

(a) make a draft report publicly available; and

(b) allow a reasonable time for comments on the draft.

(2) In preparing its final report, the Commission must have regard to any comments received on the draft report within the time allowed.

51D Publication and status of competition report

(1) The Commission must—

(a) provide the final competition report to the Minister; and

(b) at least 5 working days later, make the final competition report publicly available.

(2) To avoid doubt, a competition report is not a determination of the Commission.

51E Minister must respond to competition report

The Minister must respond to the final competition report within a reasonable time after the report is made publicly available.

Part 2
Specified airport services

5 Section 52C amended (Interpretation)

(1) In section 52C, replace the definition of **inquiry** with:

inquiry means,—

(a) for the purposes of **subpart 11**, an inquiry by the Commission into the regulation of specified airport services that is carried out in accordance with **sections 56F to 56H**; and

(b) for all other purposes, an inquiry by the Commission that is carried out in accordance with sections 52H to 52J

(2) In section 52C, repeal the definition of **publicly available**.

6 Section 52P amended (Determinations by Commission under this section)

(1) In section 52P(2)(b),—

(a) replace "any of subparts 9 to 11" with "subparts 9 and 10"; and

(b) replace "55E, and 56E." with "and 55E; and".

(2) After section 52P(2)(b), insert:

(c) in the case of regulation being imposed on specified airport services under **section 56K**, in accordance with **section 56L**.

7 Section 52U amended (When input methodologies must be determined)

Repeal section 52U(1) and (2).

8 Section 53B amended (Effect of being subject to information disclosure regulation)

After section 53B(2), insert:

(3) To avoid doubt, the Commission may, as part of a summary and analysis, include an analysis of how effective the information disclosure requirements imposed on the goods or services are in promoting the purpose of this Part.

9 Section 53ZD amended (Powers of Commission under this Part)

In section 53ZD, insert as subsection (2):

(2) In subsection (1)(e), **inquiry** also means an inquiry carried out in accordance with **sections 56F to 56H**.

10 Subpart 11 of Part 4 replaced

Replace subpart 11 of Part 4 with:

Subpart 11—Airport services

Overview and interpretation

56 Overview of subpart

(1) This subpart provides that—

(a) specified airport services are subject to information disclosure regulation under this Part; and

(b) negotiate/arbitrate regulation, default/customised price-quality regulation, or individual price-quality regulation may be imposed on specified airport services after an inquiry; and

(c) other services may be declared specified airport services by Order in Council.

(2) This section is only a guide.

56A Interpretation

(1) In this subpart,—

specified airport company means—

(a) the company (as defined in section 2 of the Auckland Airport Act 1987) that operates Auckland International Airport or any subsidiary of, or successor to, that company that operates all or part of the airport; and

(b) the company (as defined in section 2 of the Wellington Airport Act 1990) that operates Wellington International Airport or any subsidiary of, or successor to, that company that operates all or part of the airport; and

(c) the airport company (as defined in section 2 of the Airport Authorities Act 1966) that operates Christchurch International Airport or any subsidiary of, or successor to, that company that operates all or part of the airport

specified airport services means all of the services supplied by specified airport companies in markets directly related to the following activities (whether for international or domestic flights):

(a) aircraft and freight activities:

(b) airfield activities:

(c) specified passenger terminal activities:

(d) any other services declared to be specified airport services by Order in Council made under **section 56M**.

(2) In **subsection (1)**, **aircraft and freight activities**, **airfield activities**, and **specified passenger terminal activities** have the same meanings as in section 2 of the Airport Authorities Act 1966.

Specified airport services regulated under this Part

56B Specified airport services declared to be regulated

Specified airport services are regulated under this Part.

56C Specified airport services subject to information disclosure regulation

Specified airport services are subject to information disclosure regulation under this Part.

56D Specified airport services subject to additional regulation if imposed by Order in Council

In addition to information disclosure regulation, specified airport services are subject to the type of regulation (if any) imposed by Order in Council made under **section 56K**.

Duty to supply information to Secretary

56E Duty to supply information to Secretary

A specified airport company must, as soon as practicable after disclosing information under this Part, supply a copy of the information to the Secretary (as defined in section 2(1) of the Civil Aviation Act 1990).

Commission inquiry into regulation of specified airport services

56F How inquiry triggered

(1) The Commission—

(a) must hold an inquiry into the regulation of specified airport services if required to do so by the Minister; and

(b) may hold an inquiry on its own initiative.

(2) Any requirement by the Minister must—

(a) be in writing; and

(b) specify the date by which the Commission must make a recommendation to the Minister under **section 56H**.

56G Commission inquiry

(1) In conducting an inquiry into the regulation of specified airport services, the Commission must consider—

(a) whether, in addition to information disclosure regulation, 1 of the following types of regulation should be imposed on the services:

(i) negotiate/arbitrate regulation:

(ii) default/customised price-quality regulation:

(iii) individual price-quality regulation; and

(b) if so, how that type of regulation should apply to specified airport companies.

(2) As part of the inquiry, the Commission must—

(a) determine or amend (and then apply) input methodologies for the supply of the services, in accordance with subpart 3; and

(b) when considering whether a type of regulation might be imposed, assess the benefits of imposing different types of regulation in meeting the purpose of this Part against the costs of imposing those types of regulation.

(3) The input methodologies must be determined or amended as soon as practicable after the inquiry is triggered.

(4) During an inquiry, the Commission may have regard to any other matters it considers necessary or desirable for the purpose of the inquiry.

(5) An inquiry under this section must follow the process set out in section 52J.

56H Commission's recommendations following inquiry

(1) At the end of an inquiry, having considered the matters in **section 56G**, the Commission must make a recommendation to the Minister on whether 1 of the following should be imposed on specified airport services:

(a) negotiate/arbitrate regulation:

(b) default/customised price-quality regulation:

(c) individual price-quality regulation.

(2) If the Commission recommends imposing a type of regulation specified in **subsection (1)**, its recommendation must state the following:

(a) the type of regulation that is recommended:

(b) what input methodologies apply:

(c) if negotiate/arbitrate regulation is recommended, the material provisions of the negotiation process and arbitration process:

(d) if default/customised price-quality regulation is recommended, the default price path and quality standards:

(e) if individual price-quality regulation is recommended, the material provisions to apply.

(3) The Minister must publish the Commission's recommendation, and may do so in whatever way the Minister considers appropriate.

(4) To avoid doubt, a recommendation by the Commission is not a determination of the Commission.

Order in Council imposing additional type of regulation

56I Minister must consider Commission's recommendation

(1) The Minister must consider any recommendation of the Commission made under **section 56H**.

(2) When considering the recommendation, the Minister—

(a) must consult with the Minister of Transport; and

(b) may request further information or advice from the Commission.

(3) If the Minister proposes a different type of regulation to the type that the Commission recommends, the Minister must request written advice from the Commission on what the material provisions of a section 52P determination would be likely to be under the Minister's proposal.

(4) Any request by the Minister under **subsection (3)**, and the Commission's advice on it, must be made publicly available.

(5) If the Commission receives a request under **subsection (3)**, it may, at its discretion,—

(a) consult with interested parties; or

(b) reopen its inquiry, in which case section 52J applies with all necessary modifications.

56J Minister's decision and recommendation

(1) Having considered the Commission's recommendation in accordance with **section 56I** and any written advice given following a request under **section 56I(3)**, the Minister must—

(a) decide whether, in addition to information disclosure regulation, 1 of the following types of regulation should be imposed on specified airport services:

(i) negotiate/arbitrate regulation:

(ii) default/customised price-quality regulation:

(iii) individual price-quality regulation; and

(b) if so, make a recommendation to the Governor-General specifying the type of regulation that should be imposed.

(2) The Minister's decision may be the same as, or different from, the Commission's recommendation under **section 56H**.

(3) If the Minister's decision is different from the Commission's recommendation, the Minister must set out the reasons for the decision and make the decision, with the reasons, publicly available.

56K Order in Council imposing additional type of regulation

(1) The Governor-General may, on the recommendation of the Minister made under **section 56J**, make an Order in Council imposing 1 of the following types of regulation on specified airport services:

(a) negotiate/arbitrate regulation:

(b) default/customised price-quality regulation:

(c) individual price-quality regulation.

(2) The order must include an expiry date (which must be no later than 20 years after the commencement date) at the close of which the order is revoked.

(3) Despite **subsection (2)**, the order may be earlier revoked in the manner in which it was made.

(4) The order is a legislative instrument and a disallowable instrument for the purposes of the Legislation Act 2012 and must be presented to the House of Representatives under section 41 of that Act.

56L Commission determination about how regulation applies

(1) As soon as practicable after an Order in Council is made under **section 56K**, the Commission must make a section 52P determination specifying how the type of regulation imposed by the order will apply to specified airport services.

(2) The determination must not differ in any material respect from the recommendation under **section 56H**, or (if applicable) from any advice given to the Minister under **section 56I(3)**.

Declaring services to be specified airport services

56M Order in Council declaring specified airport services

(1) The Governor-General may, on the recommendation of the Minister, make an Order in Council declaring 1 or more services to be specified airport services for the purposes of this **subpart**.

(2) Before recommending that an Order in Council be made, the Minister must be satisfied that—

(a) the Commission has made a recommendation to the same effect; and

(c) the Commission has consulted (without necessarily holding an inquiry) with interested parties.

(3) Before making a recommendation under **subsection (2)(a)**, the Commission—

(a) must assess the benefits, in meeting the purpose of this Part, of declaring the services to be specified airport services against the costs of declaring the services to be specified airport services; and

(b) must be satisfied that the services are supplied in a market where 1 or more of the specified airport companies have a substantial degree of market power.

Subpart 2 not limited

56N Subpart 2 not limited

This **subpart** does not limit subpart 2, which allows for regulation to be imposed on particular goods or services.

Part 3
Enforceable undertakings, information management, and miscellaneous provisions

Enforceable undertakings

10A Section 69A amended (Commission may accept undertakings)

After section 69A(3), insert:

(4) This section overrides **section 74A**.

11 Sections 74AA to 74D and cross-heading replaced

Replace sections 74AA to 74D and the cross-heading above section 74AA with:

Power to accept undertakings 5

74A Commission may accept undertakings

(1) The Commission may accept a written undertaking given by, or on behalf of, a person in connection with any matter relating to the enforcement of this Act.

(2) The person may withdraw or vary the undertaking with the consent of the Commission. 10

(3) *See* section 69A, which overrides this section in respect of undertakings relating to clearances or authorisations for business acquisitions.

Compare: 1986 No 121 s 46A

74AB Matters included in undertakings

(1) An undertaking under **section 74A** may, without limitation, include either or both of the following: 15

(a) an undertaking to pay compensation to any person or otherwise take action to avoid, remedy, or mitigate any actual or likely adverse effects arising from a contravention, or possible contravention, of this Act:

(b) an undertaking to pay to the Commission all or part of the Commission's costs incurred in investigating, or bringing proceedings in relation to, a contravention, or possible contravention, of this Act. 20

(2) However, the Commission may accept an undertaking relating to the enforcement of section 47 only if the undertaking is to dispose of assets or shares specified in the undertaking. 25

(3) If the Commission accepts an undertaking that involves payment of compensation to any person, or payment of the Commission's costs, the Commission must make the following information publicly available:

(a) the amount of the compensation, or of the Commission's costs, that has been undertaken to be paid; and 30

(b) a brief description of the circumstances and nature of the contravention or possible contravention of this Act to which the undertaking relates.

(4) In this section, a **contravention** means any of the following:

(a) an actual contravention:

(b) aiding, abetting, counselling, or procuring a contravention: 35

(c) inducing a contravention, whether by threats, promises, or otherwise:

(d) being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention:

(e) conspiring with any other person in a contravention.

74B Enforcement of undertakings

(1) If the Commission considers that a person has breached an undertaking given under **section 74A**, the Commission may apply to the High Court for an order under **subsection (2)**.

(2) The court may make any 1 or more of the following orders if it is satisfied that the person has breached a term of the undertaking:

(a) an order directing the person to comply with the term:

(b) an order directing the person to pay to the Crown an amount not exceeding the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach:

(c) any order that the court thinks appropriate that directs the person to compensate any other person who has suffered loss or damage as a result of the breach:

(d) an order for any consequential relief that the court thinks appropriate.

Compare: 1986 No 121 s 46B

12 Section 75 amended (Jurisdiction of High Court)

(1) In section 75(1), replace "shall" with "must".

(2) Replace section 75(1)(aa) with:

(aa) applications for orders under **section 74B** to enforce undertakings:

13 Section 76 amended (Jurisdiction of District Courts)

(1) In the heading to section 76, replace "**Courts**" with "**Court**".

(2) In section 76, replace "shall" with "must".

14 Section 92 amended (Persons entitled to appeal)

Repeal section 92(f).

Information management

14A Section 100 amended (Powers of Commission to prohibit disclosure of information, documents, and evidence)

After section 100(4), insert:

(5) For the purposes of this section, an **inquiry** includes a competition study (as defined in **section 48**).

Miscellaneous and transitional provisions

15 Section 2 amended (Interpretation)

(1) In section 2(1), repeal the definition of **Commissioner**.

(2) In section 2(1), insert in its appropriate alphabetical order:

publicly available, in relation to making a document or information available, means that— 5

(a) the document or information is available for inspection, free of charge, on an Internet site that is publicly accessible at all reasonable times; and

(b) a copy of the document or information is available for inspection at all reasonable times, free of charge, at the head office of the person that is required to make it publicly available or, if the person is the Minister, at the head office of the department responsible for the administration of this Act; and 10

(c) copies of the document may be purchased by any person at a reasonable price 15

16 Section 30C amended (Cartel provisions generally unenforceable)

In section 30C(2), replace “44A(4) and (5)” with “44A(4) or (5)”.

16A Section 31 amended (Exception for collaborative activity)

In section 31(3)(a), after “understanding”, insert “that contains the provision”.

16B Section 87C amended (Injunction and other orders relating to price-quality regulation) 20

(1) In section 87C(1)(b), replace “requiring” with “make an order requiring”.

(2) In section 87C(2), after “for”, insert “an injunction or”.

17 Schedule 1AA amended

In Schedule 1AA, after Part 1, insert the **Part 2** set out in the **Schedule** of this Act. 25

Schedule
New Part 2 inserted into Schedule 1AA

s 17

Part 2
Provisions relating to Commerce Amendment Act 2018

1 Interpretation

(1) In this Part,—

Amendment Act 2018 means the Commerce Amendment Act **2018**

commencement date means the date on which **section 11** of the Amendment Act 2018 comes into force

Commissioner has the meaning given in former section 2(1)

outstanding application means an application for a cease and desist order under former section 74B(b) that was—

(a) made by an employee of the Commission before the commencement date; but

(b) not determined by a Commissioner (either by making, or declining to make, an order) before the commencement date.

(2) In this Part, a reference to a former section (for example, former section 74B(b)) is a reference to that section as in force immediately before the commencement date.

Cease and desist orders

2 Term of appointment of cease and desist Commissioners

(1) If there are no outstanding applications, the Commissioners cease to hold office on the commencement date.

(2) If there are 1 or more outstanding applications, the Commissioners continue in office under the notice of appointment made under former section 74AA.

3 Applications for cease and desist orders made before commencement

Former sections 74A to 74C remain in force for the purposes of allowing a Commissioner to consider and determine an outstanding application.

4 Cease and desist orders continued

(1) The following continue in force on and from the commencement date:

(a) cease and desist orders made before the commencement date:

(b) cease and desist orders made on or after the commencement date in accordance with **clause 3**.

(2) Former section 74D continues to apply in relation to the orders described in **subclause (1)**.

(3) The High Court, on an application by the Commission or a person subject to a cease and desist order, may amend or revoke an order continued by **subclause (1)**.

5 Entitlement to appeal cease and desist order

(1) Former section 92(f) remains in force for the purpose of allowing a person to appeal against a determination of a Commissioner under former section 74A.

(2) **Subclause (1)** applies irrespective of whether the determination was made—

(a) before the commencement date; or

(b) in accordance with **clause 3**, on or after the commencement date.

6 Court may not refer appeals back for reconsideration

(1) This clause applies if—

(a) the Commissioners have ceased to hold office, either under **clause 2(1)** or because the term of appointment referred to in former section 74AA(3)(a)(ii) has expired; but

(b) an appeal against a determination of a Commissioner under former section 74A is being considered by the High Court.

(2) The High Court—

(a) must determine the appeal under section 93; and

(b) despite section 94, must not refer any matter relating to the appeal back to the Commissioners to reconsider.

Legislative history

28 March 2018	Introduction (Bill 45–1)
1 May 2018	First reading and referral to Transport and Infrastructure Committee
12 September 2018	Reported from the Transport and Infrastructure Committee (Bill 45–2)
16 October 2018	Second reading
23 October 2018	Committee of the whole House (Bill 45–3)

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