

# **Commerce Amendment Bill**

Government Bill

As reported from the Transport and Infrastructure Committee

## **Commentary**

### **Recommendation**

The Transport and Infrastructure Committee has examined the Commerce Amendment Bill and recommends by majority that it be passed with the amendments shown.

### **Introduction**

The bill seeks to amend the Commerce Act 1986. Part 1 of the bill would enable the Commerce Commission to undertake “competition studies”—carrying out research into the structure and behaviour of markets, and reporting on its findings. The responsible Minister could direct the commission to undertake a competition study and the commission could also self-initiate a study where it is in the public interest to do so. The commission would be empowered to require organisations and businesses to provide it with information for the studies. The overriding aim of any competition study would be the same as the purpose of the Act itself: to promote competition in markets for the long-term benefit of consumers within New Zealand.

Part 2 of the bill would amend Part 4 of the Act to strengthen the regulatory regime for airports. At present, specified airport services<sup>1</sup> at Auckland, Christchurch, and Wellington airports are subject to information disclosure regulation, which is the lightest type of economic regulation provided for under Part 4 of the Act. The bill would not change the way airports are regulated or grant broader powers to the commission. Its main change would be to introduce a new truncated inquiry process for the commission and the Minister to consider when deciding whether to impose a stronger type of regulation on airports in the future.

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<sup>1</sup> “Specified airport services” cover aeronautical services such as aircraft and freight services, airfield services, and passenger terminals.

In Part 3, the bill would introduce an enforceable undertakings regime to complement the commission's existing arrangements. It would replace the little-used provisions relating to cease-and-desist orders with a power for the commission to accept a statutory undertaking.

### **Proposed amendments**

This commentary covers the main amendments we recommend to the bill as introduced. We do not discuss minor or technical amendments.

### **Competition studies**

Clause 4 would insert new Part 3A in the Act to enable the commission to carry out competition studies. Under new section 48, a competition study would be defined as a study of any factors that may affect competition for the supply or acquisition of goods or services. The commission could initiate a study if it considered it to be in the public interest (new section 50) or if the Minister required after making a similar public interest assessment (new section 51). The commission would need to report on its findings, and could make recommendations to the Government or to private citizens and companies (new section 51B).

### **Obtaining, using, and sharing information**

We considered carefully the points made in submissions regarding the commission's powers to obtain, use, and share information. We acknowledge concern about the cost to businesses of providing information, and about the commercial sensitivity of information.

Because the bill would make competition studies a function of the commission, it would be able to use its existing compulsory information-gathering powers under section 98 of the Act. We note that the commission may only exercise these powers where it is "necessary or desirable" for it to carry out its functions. We consider that these existing information-gathering powers are appropriate, and do not see a case for limiting or extending them.

We also do not see a case for exempting the commission from the Official Information Act 1982 when it is conducting competition studies. However, we recommend inserting new clause 14A to provide that, under section 100 of the Act, the commission could issue confidentiality orders over specified information when carrying out competition studies, as it can for an inquiry under Part 4 of the Act.

In addition, we understand that the commission will be preparing guidelines about its approach to conducting competition studies. We would like to see these guidelines set out the commission's approach to protecting confidential information and its use of confidentiality orders.

### **Preparation of competition report**

Clause 4, new section 51B(2) sets out the types of recommendation that the commission may make in a report. For clarity, we recommend inserting subsection (1A) into

new section 51B to specify that the commission would also have the option of making no recommendations.

### **Government response to competition report**

As introduced, the bill would not require the Government to respond to a competition study report. This accords with the practice in most other jurisdictions. While it is generally expected that a government would respond to competition studies, there is not usually a statutory requirement to do so.

We consider that it would be appropriate for the legislation to require a government response to the final report. We do not consider it necessary to specify a time frame or process for the response. We recommend inserting new section 51E to require the Minister to respond to the commission's final report on a competition study within a reasonable time frame.

We also recommend amending new section 51D to make clear the process to be followed for the publication of the commission's final report. Under our proposal, the Minister should receive a copy of the final report at least 5 working days before the commission releases it to the public.

### **Evaluation of competition studies**

We would like to see evaluations carried out to assess the effectiveness of each study and of the regime as a whole. We do not propose any legislative amendment in this regard. However, we suggest that, as part of the commission's accountability arrangements with the responsible Minister, one of its performance measures should be to evaluate each competition study and report the results in its annual report.

### **Regulation of airport services**

Part 2 of the bill deals with the regulation of specified airport services.

The bill would retain the existing short-form process by which new airport services could be made subject to regulation. Under this existing process, before recommending an Order in Council to declare (and regulate) a new airport service as a "specified airport service", the Minister must first be satisfied that the commission has consulted with interested parties and made a recommendation to the same effect.

We acknowledge concern that this existing process, when combined with the new truncated inquiry process, could mean that regulation was imposed on airport services without a full assessment of whether that regulation was appropriate.

To address this concern, we recommend inserting new subsection 56M(3) to add a requirement for the commission to assess the benefits and costs of regulating other airport services before making a recommendation. Before recommending an Order in Council, the commission would also need to be satisfied that the services were being supplied in a market where one or more specified airport companies had a substantial degree of market power. Under the current Act, the Minister must make this assessment.

To avoid doubt, we recommend inserting new section 56N to make it clear that any other airport company, besides the three in Auckland, Christchurch, and Wellington, could be regulated under subpart 2 of Part 4 following the inquiry and Order in Council processes for goods or services.

### **Enforceable undertakings**

Part 3 of the bill would introduce an enforceable undertakings regime in the Act, based on the existing regime in the Fair Trading Act 1986<sup>2</sup>.

As introduced, the bill would allow undertakings to be offered in relation to a contravention or possible contravention of the main prohibitions and offences under the Act, including economic regulation under Part 4. However, the bill would not allow undertakings in relation to mergers or acquisitions (section 47 of the Act). This is designed to limit the incentives for parties to bypass the Commerce Commission's merger clearance process by offering undertakings to address any competition concerns.

### **Merger clearance decisions**

It was suggested to us that the bill (and section 69A of the Act) should be amended to allow the commission to accept behavioural undertakings for merger clearance decisions. Without a full policy review, we do not support any change to the current merger clearance regime, and believe the commission should continue to be prevented from accepting behavioural undertakings.

### **Undertakings for merger enforcement**

We accept that allowing the commission to accept enforceable undertakings in an enforcement context regarding mergers may be cost effective. We recommend inserting new section 74AB(2), to allow the commission to accept structural undertakings in relation to the enforcement of section 47.

### **Payment of compensation and costs**

We recommend inserting new section 74AB(1) in clause 11, to make it clear that an undertaking could entail an obligation to pay compensation, to take action to remedy the matter, and to contribute to all or part of the commission's costs in connection with the matter. Under our proposed new section 74AB(2), if the commission accepted an undertaking that included compensation or payment for costs, it would have to publish the circumstances in which it was accepting the undertaking, and the amount of the compensation or costs undertaken to be paid.

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<sup>2</sup> An enforceable undertaking acts like an out-of-court settlement. It is considered a cost-effective enforcement tool as it can be used by a regulator to resolve alleged breaches of the law without asking a court to find a breach and impose a penalty.

## **New Zealand National Party view**

National Party members do not support the bill in its current form. The amendments proposed in the departmental report do not address the issues we have with the bill. We recommend that the bill not proceed.

The issues with the bill fall into two broad areas:

- Commerce Commission self-initiation powers for competition studies
- additional regulatory powers with respect to airport services.

### **Competition studies**

The National Party view is that competition studies should either be initiated by the responsible Minister, or, if initiated by the Commerce Commission, be subject to ministerial approval.

Submissions received and evidence provided by officials indicate that competition studies will incur significant costs to both the commission and to businesses within the market subject to the study.

Further, the commission confirmed that each study would require investigation across a broad range of businesses to make the study representative of the market. That would increase the total cost to businesses. Ultimately these costs are borne by consumers.

Evidence provided by officials regarding the Australian Competition and Consumer Commission (ACCC) shows that the use of powers to compel businesses to provide information further adds to the costs on those businesses.

That evidence also identified that, while the ACCC can self-initiate competition studies, it does not have the power to compel businesses to provide information, or specific information. Where they are able to exercise compulsory data-gathering powers, the inquiry or study is subject to ministerial approval.

The Commerce Amendment Bill would provide the Commerce Commission with compulsory information-gathering powers for competition studies, including self-initiated studies.

National Party members hold that the potential costs and impacts of competition studies are such that they should either be initiated by the responsible Minister, or be subject to the Minister's approval if initiated by the commission.

### **Regulation of airport services**

While National Party members acknowledge officials have recommended some amendments to these provision in the departmental report, we hold that the test for the need for additional regulatory powers has not been met.

National Party members note that in the regulatory impact statement officials noted that there is no evidence that the current regulatory regime is not working and that, even if it were not working optimally, the cost impact to end consumers would be small and much less significant than other competitive pressures on airfares.

National Party members hold that neither submitters, nor officials, provided evidence that refutes those points in the regulatory impact statement.

## **Appendix**

### **Committee process**

The Commerce Amendment Bill was referred to the committee on 1 May 2018. The closing date for submissions was 15 June 2018. We received and considered 24 submissions from interested groups and individuals. We heard oral evidence from 10 submitters at hearings in Wellington.

We received advice from the Ministry of Business, Innovation and Employment.

### **Committee membership**

Darroch Ball (Chairperson)

Alastair Scott

Paul Eagle

Matt King

Jan Logie

Jami-Lee Ross

Tim van de Molen

Hon Meka Whaitiri

Michael Wood



**Key to symbols used in reprinted bill**

**As reported from a select committee**

text inserted by a majority

text inserted unanimously

~~text deleted by a majority~~

~~text deleted unanimously~~



*Hon Kris Faafoi*

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Subpart 11—Airport services

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**Enforceable undertakings, information management, and miscellaneous provisions**

*Enforceable undertakings*

<u>10A</u>	<u>Section 69A amended (Commission may accept undertakings)</u>	<u>12</u>
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*Power to accept undertakings*

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15		Section 2 amended (Interpretation)	15
16		Section 30C amended (Cartel provisions generally unenforceable)	15
<u>16A</u>		<u>Section 31 amended (Exception for collaborative activity)</u>	<u>15</u>
<u>16B</u>		<u>Section 87C amended (Injunction and other orders relating to price-quality regulation)</u>	<u>15</u>
17		Schedule 1AA amended	15
		<b>Schedule</b>	<b>16</b>
		<b>New Part 2 inserted into Schedule 1AA</b>	

**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. 5
- (2) The rest of 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** 10  
**Competition studies**

**4 New Part 3A inserted**

After Part 3, insert:

**Part 3A**  
**Competition studies** 15

**48 Interpretation**

In this Part, unless the context otherwise requires,—

<b>competition report</b>	means a report prepared by the Commission under <b>section 51B</b>	
<b>competition study</b>	means a study of any factors that may affect competition for the supply or acquisition of goods or services	
<b>department</b>	means a department of the public service specified in Schedule 1 of the State Sector Act 1988	5
<b>organisation</b>	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:	10
(c)	the Auditor-General.	
<b>49</b>	<b>Functions of Commission under this Part</b>	
	The functions of the Commission under this Act include carrying out competition studies, and preparing competition reports, under this Part.	15
<b>50</b>	<b>Commission may carry out competition study</b>	
(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 <i>Gazette</i> , <del>issue a statement of intention to carry out the study, which must</del>	20
(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 <b>subsections (1) to (3)</b> .	25
(5)	The Commission may revoke the notice by further notice in the <i>Gazette</i> .	
<b>51</b>	<b>Minister may require Commission to carry out competition study</b>	
(1)	The Minister may, by notice in the <i>Gazette</i> , require the Commission to carry out a competition study if the Minister considers it to be in the public interest to do so.	30
(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.	35
(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 <b>subsections (1) to (4)</b> .	
(6)	The Minister, having first consulted with the Commission, may revoke the notice by further notice in the <i>Gazette</i> .	5
<b>51A Competition study terms of reference</b>		
(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.	10
(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:	15
	(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:	20
	(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	25
	(b) may exercise its discretion in relation to any ancillary matters that are related to, but not explicitly covered by, the terms of reference.	
<b>51B Preparation of competition report</b>		
(1)	The Commission must prepare a competition report that records its findings from the competition study.	30
<u>(1A)</u>	<u>The Commission may make recommendations in the report but it is not required to do so.</u>	
(2)	<del>The report</del> <u>The recommendations may, without limitation, recommend</u> include 1 or more of the following:	35
	(a) changes to legislation or other instruments:	

<ul style="list-style-type: none"> <li>(b) changes to the policies or practices of central or local government:</li> <li>(c) changes to the policies or practices of a person or an organisation responsible for the oversight or regulation of a specified industry:</li> <li>(d) changes to the amount or type of information made available by a person or an organisation in relation to a specified industry:</li> <li>(e) that a person or an organisation research or monitor a specified matter:</li> <li>(f) that persons within a specified industry change their behaviour.</li> </ul>	5
<b>51C Consultation on draft competition report</b>	
<ul style="list-style-type: none"> <li>(1) Before a competition report is finalised, the Commission must— <ul style="list-style-type: none"> <li>(a) make a draft report publicly available; and</li> <li>(b) allow a reasonable time for comments on the draft.</li> </ul> </li> <li>(2) In preparing its final report, the Commission must have regard to any comments received on the draft report within the time allowed.</li> </ul>	10
<b>51D Publication and status of competition report</b>	
<ul style="list-style-type: none"> <li><del>(1) A final competition report must be made publicly available.</del></li> <li>(1) <u>The Commission must—</u> <ul style="list-style-type: none"> <li><u>(a) provide the final competition report to the Minister; and</u></li> <li><u>(b) at least 5 working days later, make the final competition report publicly available.</u></li> </ul> </li> <li>(2) To avoid doubt, a competition report is not a determination of the Commission.</li> </ul>	15  20
<b><u>51E Minister must respond to competition report</u></b>	
<u>The Minister must respond to the final competition report within a reasonable time after the report is made publicly available.</u>	

## Part 2

### Specified airport services 25

<b>5 Section 52C amended (Interpretation)</b>	
<ul style="list-style-type: none"> <li>(1) In section 52C, replace the definition of <b>inquiry</b> with: <ul style="list-style-type: none"> <li><b>inquiry</b> means,— <ul style="list-style-type: none"> <li>(a) for the purposes of <b>subpart 11</b>, an inquiry by the Commission into the regulation of specified airport services that is carried out in accordance with <b>sections 56F to 56H</b>; and</li> <li>(b) for all other purposes, an inquiry by the Commission that is carried out in accordance with sections 52H to 52J</li> </ul> </li> </ul> </li> <li>(2) In section 52C, repeal the definition of <b>publicly available</b>.</li> </ul>	30

<b>6</b>	<b>Section 52P amended (Determinations by Commission under this section)</b>	
(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:	5
	(c) in the case of regulation being imposed on specified airport services under <b>section 56K</b> , in accordance with <b>section 56L</b> .	
<b>7</b>	<b>Section 52U amended (When input methodologies must be determined)</b>	
	Repeal section 52U(1) and (2).	
<b>8</b>	<b>Section 53B amended (Effect of being subject to information disclosure regulation)</b>	10
	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 <del>achieving</del> <u>promoting</u> the purpose of this Part.	15
<b>9</b>	<b>Section 53ZD amended (Powers of Commission under this Part)</b>	
	In section 53ZD, insert as subsection (2):	
(2)	In subsection (1)(e), <b>inquiry</b> also means an inquiry carried out in accordance with <b>sections 56F to 56H</b> .	20
<b>10</b>	<b>Subpart 11 of Part 4 replaced</b>	
	Replace subpart 11 of Part 4 with:	
	<p>Subpart 11—Airport services</p> <p><i>Overview and interpretation</i></p>	
<b>56</b>	<b>Overview of subpart</b>	25
(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	30
	(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 5
- (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 10
- (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 15

**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): 15

- (a) aircraft and freight activities:
- (b) airfield activities:
- (c) specified passenger terminal activities: 20
- (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. 25

*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. 30

**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**. 35

*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).

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*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.

10

(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**.

15

**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.

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25

(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.

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(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.

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(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: 5
- (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: 10
- (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: 15
  - (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. 20

*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**. 25
- (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. 30
- (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,— 35
- (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— 5
  - (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: 10
    - (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**. 15
- (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** 20

- (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: 25
  - (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. 30
- (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. 35

- (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**

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- (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—

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- (a) the Commission has made a recommendation to the same effect; and  
 (b) ~~the services are supplied in a market where 1 or more of the specified airport companies have a substantial degree of market power; and~~  
 (c) the Commission has consulted (without necessarily holding an inquiry) with interested parties.

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- (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.

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*Subpart 2 not limited*

**56N Subpart 2 not limited**

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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**

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*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*

- 74A Commission may accept undertakings** 5
- (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.
- (3) ~~Despite **subsection (1)**, the Commission must not accept an undertaking in connection with the enforcement of section 47.~~ 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** 15
- (1) An undertaking under **section 74A** may, without limitation, include either or both of the following:
- (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: 20
- (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.
- (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: 35
- (b) aiding, abetting, counselling, or procuring a contravention:
- (c) inducing a contravention, whether by threats, promises, or otherwise:

<p>(d) <u>being in any way, directly or indirectly, knowingly concerned in, or party to, a contravention:</u></p> <p>(e) <u>conspiring with any other person in a contravention.</u></p> <p><b>74B Enforcement of undertakings</b></p> <p>(1) If the Commission considers that a person has breached an undertaking given under <b>section 74A</b>, the Commission may apply to the High Court for an order under <b>subsection (2)</b>.</p> <p>(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:</p> <p style="padding-left: 20px;">(a) an order directing the person to comply with the term:</p> <p style="padding-left: 20px;">(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:</p> <p style="padding-left: 20px;">(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:</p> <p style="padding-left: 20px;">(d) an order for any consequential relief that the court thinks appropriate.</p> <p>Compare: 1986 No 121 s 46B</p> <p><b>12 Section 75 amended (Jurisdiction of High Court)</b></p> <p>(1) In section 75(1), replace “shall” with “must”.</p> <p>(2) Replace section 75(1)(aa) with:</p> <p style="padding-left: 20px;">(aa) applications for orders under <b>section 74B</b> to enforce undertakings:</p> <p><b>13 Section 76 amended (Jurisdiction of District Courts)</b></p> <p>(1) In the heading to section 76, replace “Courts” with “Court”.</p> <p>(2) In section 76, replace “shall” with “must”.</p> <p><b>14 Section 92 amended (Persons entitled to appeal)</b></p> <p>Repeal section 92(f).</p> <p style="text-align: center;"><i>Information management</i></p> <p><b>14A Section 100 amended (Powers of Commission to prohibit disclosure of information, documents, and evidence)</b></p> <p>After section 100(4), insert:</p> <p>(5) <u>For the purposes of this section, an <b>inquiry</b> includes a competition study (as defined in <b>section 48</b>).</u></p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p>
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*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**

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<b>Part 2</b>		
<b>Provisions relating to Commerce Amendment Act 2018</b>		5
<b>1</b>	<b>Interpretation</b>	
(1)	In this Part,—	
	<b>Amendment Act 2018</b> means the Commerce Amendment Act <b>2018</b>	
	<b>commencement date</b> means the date on which <b>section 11</b> of the Amendment Act 2018 comes into force	10
	<b>Commissioner</b> has the meaning given in former section 2(1)	
	<b>outstanding application</b> 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	15
	(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.	20
<i>Cease and desist orders</i>		
<b>2</b>	<b>Term of appointment of cease and desist Commissioners</b>	
(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.	25
<b>3</b>	<b>Applications for cease and desist orders made before commencement</b>	
	Former sections 74A to 74C remain in force for the purposes of allowing a Commissioner to consider and determine an outstanding application.	
<b>4</b>	<b>Cease and desist orders continued</b>	30
(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 <b>clause 3</b> .	

- (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
- 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— 10
- (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— 15
- (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— 20
- (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  
1 May 2018

Introduction (Bill 45–1)  
First reading and referral to Transport and Infrastructure  
Committee