Interim report on the Commerce (Cartels and Other Matters) Amendment Bill

Interim report of the Commerce Committee

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Commerce (Cartels and Other Matters) Amendment Bill

Recommendation

The Commerce Committee recommends that the House take note of its report.

Introduction

On 3 September 2012 the Minister of Commerce wrote to the committee requesting that it consider, alongside the Commerce (Cartels and Other Matters) Amendment Bill, a proposal to transition international shipping and international civil aviation from a competition regime regulated by industry-specific legislation (the Shipping Act 1987 and the Civil Aviation Act 1990, respectively), to a regime governed by the Commerce Act 1986.

Details of proposed amendments

At present, competition issues in international shipping and civil aviation are, for the most part, regulated according to sector-specific regimes in the Shipping Act and the Civil Aviation Act, rather than under the general competition law set out in the Commerce Act. In this respect, they are regarded as anomalies.

To provide for international shipping and international civil aviation transitioning to a competition regime that is governed by the Commerce Act would require the following amendments to be made to the Commerce Act, the Shipping Act, and the Civil Aviation Act:

International shipping

- Repealing section 44(2) of the Commerce Act (this section provides that the prohibitions in Part 2 of the Commerce Act, including the prohibition against hard-core cartel conduct in section 30, do not apply to international shipping).
- Repealing Part 1 of the Shipping Act (this sets out an alternate regime under which competition in international shipping is regulated).

International civil aviation

- Repealing Part 9 of the Civil Aviation Act (this sets out an alternate regime under which competition in international air carriage is regulated).
- Providing transitional arrangements for arrangements that have already been authorised under section 88 of the Civil Aviation Act.

With regard to international shipping, the Minister has asked the committee to consider

- whether the safeguards built into the Commerce Act and the bill provide sufficient flexibility for international shipping lines to collaborate, in order to provide maximum capacity and frequency of services to and from New Zealand

- whether there are any risks associated with transitioning to a Commerce-Act-only regime for international shipping
- if the risks can be managed, whether any transitional arrangements would be required to move to a Commerce-Act-only regime.

With regard to civil aviation, the Minister has asked the committee to consider

- if there is a move to a Commerce Act-only regime, whether any specific mechanisms would be required to ensure that New Zealand's international obligations under international air services agreements and related understandings were taken into account; for example, whether the provision in the Commerce Act stipulating that the Commerce Commission must have regard to any economic policy statements transmitted in writing to the Commission would provide sufficient guidance for the commission or whether further direction would be required
- whether the authorisation process under the Commerce Act and the safeguards in the bill would provide sufficient flexibility for the following collaborative arrangements: airline alliances; activities (such as passenger tariff coordination systems) undertaken by the International Air Transport Association relevant to New Zealand; and joint tariff-setting by airlines outside of authorised alliances
- whether any risks are associated with transitioning to a Commerce-Act-only regime for international civil aviation
- whether transitional or grandfathering provisions should apply for existing arrangements of the types outlined above, or those already authorised under the Civil Aviation Act, if there were a move to a new regime
- if the provisions in the Civil Aviation Act relating to commission regimes are revoked, whether any industry-specific regulation is necessary to deal with the relationship between airlines, travel agents, and their clients.

While the proposal appears to be within the purview of the bill, we would like to conduct a final round of consultations with interested groups to canvass the acceptability of the Minister's proposal. A copy of the Minister's letter is attached as Appendix B to this report.

Appendix A

Committee procedure

The bill was referred to us on 24 July 2012. We called for public submissions on 26 July 2012 and have received 18 submissions from interested groups and individuals.

Committee members

Jonathan Young (Chairperson)
Kanwaljit Singh Bakshi
Hon Chester Borrows
Hon Clayton Cosgrove
Hon David Cunliffe
Clare Curran
Peseta Sam Lotu-Iiga
Mojo Mathers
Mark Mitchell

Appendix B

Office of Hon Craig Foss

MP for Tukituki

Minister of Commerce
Minister of Broadcasting

Associate Minister for ACC
Associate Minister of Education

3 SEP 2012

Mr Jonathan Young
Chairperson
Commerce Committee
Parliament Buildings
WELLINGTON 6011

Dear Mr Young

COMMERCE (CARTELS AND OTHER MATTERS) AMENDMENT BILL: CONSIDERATION OF INTERNATIONAL SHIPPING AND CIVIL AVIATION EXEMPTIONS FROM COMMERCE ACT

On 24 April 2012, the New Zealand Productivity Commission tabled its final report on the International Freight Transport Services Inquiry in Parliament. That report contained a number of recommendations to improve the performance of New Zealand's international freight systems. Included in those recommendations were recommendations relating to the competition regimes for international shipping and civil aviation. A copy of those recommendations is included as Appendix 1 to this letter.

At present, competition issues in international shipping and civil aviation are, for the most part, regulated under sector specific regimes in the Shipping Act and Civil Aviation Act, rather than under the general competition law set out in the Commerce Act.

The Productivity Commission's recommendations have raised a broader question as to whether it is appropriate to continue to regulate competition under sector specific regimes or whether to repeal the exemptions and transition to a Commerce Act regime. Transitioning to a regime under the Commerce Act would go further than the Productivity Commission recommendations.

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This issue is closely related to the amendments in the Commerce (Cartels and Other Matters) Amendment Bill (the Bill) that the Commerce Committee is currently considering. As you know, the Bill includes a number of amendments to the Commerce Act that may help mitigate uncertainty in the current law and reduce the need for industry-specific exemptions. Specifically, the amendments include:

- clarifying the scope of prohibited cartel conduct;
- introducing an exemption for collaborative activity; and
- introducing a new clearance regime.

Given the relationship between the Productivity Commission's recommendations and the Bill, I expect that the Committee would receive submissions on the desirability of maintaining the transport exemptions. Nevertheless, to ensure that all affected parties recognise that repealing the exemptions in their entirety is an option, I would like to formally request that the Committee consider:

- For international shipping, transitioning to a competition regime that is governed by the Commerce Act.
- For international civil aviation, transitioning to a competition regime that is governed by the Commerce Act.

This would ensure that the process is open and transparent and that all parties have a chance to comment on issues. It would also ensure that the Committee can undertake a thorough consideration of the issues related to the Bill.

Any changes to the regimes will have particular impacts on key parties, including cargo owners, shipping lines, airlines, airports and ports. A list of names and contact details for key affected parties is included as Appendix 2 to this letter.

Given the timing of the Committee's consideration (with submissions on the Bill due on 6 September) I would support the Committee considering a short extension of six weeks for submissions from parties wanting to submit on the issues relating to the international shipping and civil aviation exemptions.

As you know, officials from the Ministry of Business, Innovation and Employment have been appointed as advisers to the Committee on the Bill. These officials, together with officials from the Ministry of Transport, will be available to provide any additional advice the Committee requires to consider these issues alongside the Bill.

Thank you for your consideration of these issues and your work to date on the Bill.

Yours sincerely

Hon Craig Foss
Minister of Commerce

Appendix 1: Recommendations of Productivity Commission in relation to industry-specific competition regimes

International shipping

Recommendation 11.1

Ratemaking agreements – ones involving price fixing or limiting capacity with the intent of raising prices – have a high risk of anti-competitive detriment. Exemptions for such agreements should be removed and authorisation mechanism should be relied upon for assessing whether these agreements are in the public interest.

There should be a transitional period to allow the agreements in place at the time the exemption is repealed to continue until their compliance with the Commerce Act 1986 has been tested.

Recommendation 11.2

The exemption for non-ratemaking agreements should be retained in the Shipping Act 1987 and be conditional on filing agreements with the Ministry of Transport for placing on a public register.

The exemption and remedial regime should apply equally to outwards and inwards shipping.

To be eligible for exemption, agreements must allow and protect confidential individual service contracts.

The exemptions for international shipping in the Commerce Act should be repealed.

Civil Aviation

Recommendation 12.2

Subject to a review of the passenger-specific impacts, the Government should consider adopting a Commerce Act only regime for regulating international air services.

Recommendation 12.3

If the Government decides to retain Part 9 of the Civil Aviation Act, it should amend Part 9 to:

- require the Minister of Transport to have regard to an assessment of the benefits and costs of trade practices that are proposed for authorisation under s.88 or s.90 of the Act, and commission regimes that are proposed under s.89;

- require an assessment of the costs arising from any potential reduction in competition as part of each assessment of benefits and costs;
- require public consultation on the assessment of benefits and costs where the trade practice or commission regime is likely to reduce competition; and
- require the publication of s.88 and s.90 authorisations that are granted.