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Darroch Ball MP
Chairperson
Transport and Infrastructure Committee
Parliament Buildings
Wellington

Dear Mr Ball

Submission on the Commerce Amendment Bill

1. Thank you for the opportunity to make this submission on the Commerce Amendment Bill (**the Bill).** This submission sets out the Commerce Commission's (**the Commission**) views on the Bill. The Bill represents a positive step forward in extending New Zealand's competition law and the toolkit for airport regulation.

2. The Commission wishes to appear before the Transport and Infrastructure Committee in support of our submission.

Overview

Competition studies

3. We support the introduction of competition studies, and believe that the Commission is well-placed as an organisation to carry out such studies, in a way that will illuminate and assist in addressing the competition issues within studied markets.

4. We also welcome the Bill's provision for competition studies to be initiated at either the Minister's direction or at the Commission's own instigation. The proposal for the Minister to consult with the Commission before a reference is made is an important step to ensure competition studies are well-targeted and their impact on the Commission's work programme is understood; we appreciate that this step has been included.

5. We note that the current funding arrangements provide for the Commission to be allocated $1.5 million per year for competition studies, which we expect will be sufficient to allow the Commission to undertake one competition study at any given time.

6. It is important to emphasise that for the Commission to undertake competition studies in a timely and efficient way, we must have effective information gathering powers.

7. We therefore propose several amendments to the Bill that would, if adopted, enhance our effectiveness in carrying out competition studies:

   7.1 including a power to require that information is provided in a specified usable form;

   7.2 extending our existing power to obtain information from other government agencies;

   7.3 improving the safeguards on sharing information with other government agencies;

   7.4 confirming the Commission's ability to use information it obtains for one purpose or function for other purposes or functions; and

   7.5 clarifying that the Commission can make a confidentiality order prohibiting disclosure of information, documents and evidence received by the Commission during a competition study.

8. We also propose a slight amendment to the Recommendations provision, so that it is made clear that the Commission's Competition Report on completion of a competition study can include making no recommendations for change.

Airport regulation

9. We generally support the amendments to the regulatory regime for airport services. The amendments are in the long term interests of users of the three major airports in New Zealand.

Enforceable undertakings

10. We welcome the inclusion of enforceable undertakings for use in resolving Commission investigations, including those concerning anti-competitive conduct. Enforceable undertakings will enhance the efficiency of New Zealand's competition enforcement and align our competition law with international best practice.

11. We submit that enforceable undertakings should be extended so that they may be accepted in the resolution of any of the Commission's competition investigations under the Commerce Act, including merger clearances and enforcement.

Competition studies

Background and international context

12. We consider that the introduction of the competition studies function will bridge a gap in New Zealand's competition and consumer protection framework, and bring it into line with international practice.

13. Almost all competition authorities in the OECD conduct some type of competition study, including significant trading partners like Australia and the United Kingdom.[1] These countries typically refer to these studies as 'market studies'.

14. The OECD Competition Committee has recently described market studies as a versatile tool for competition authorities to analyse whether there are competition concerns in a sector, outside the context of a merger review or competition investigation.[2]

15. The OECD notes that the beneficial outcomes that promote competition from market studies can include:[3]

    15.1 recommendations to improve government involvement in markets by:

        15.1.1 removing regulatory restrictions on competition such as regulatory barriers to entry or unnecessary limitations on private sector involvement in certain markets;

        15.1.2 adjusting public procurement practices;

        15.1.3 suggesting regulatory intervention, for example, to facilitate consumer switching;

    15.2 recommendations to improve consumer protection by:

        15.2.1 ensuring consumers have sufficient information to make purchasing decisions;

        15.2.2 requiring that third party comparison services have access to relevant information;

        15.2.3 identifying behavioural biases of consumers that inhibit competition;

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1 OECD 'Guide on Market Studies for Competition Authorities,' 23 May 2018, DAF/COMP/WD(2018)26, p. 4, http://www.oecd.org/daf/competition/market-studies-and-competition.htm. See also Schedule 1 to this submission.

2 Ibid.

3 Ibid, pp. 18 - 22.

15.3 improving enforcement by:

15.3.1 improving the regulator's understanding of markets where competition is a concern;

15.3.2 follow up enforcement action;

15.3.3 identifying wider classes of consumers or conduct the regulator should focus on; and

15.4 clearing up public misconceptions about markets which are competitive but may be perceived not to be.

16. We consider that the Commission, as an independent competition authority, is well-placed in terms of depth of expertise to conduct competition studies and realise these benefits. Further, because the Commission combines competition and consumer enforcement with regulatory functions, it is well-placed to consider a range of remedial interventions.

Initiation of competition studies

17. The Bill allows for both the Minister and the Commission to initiate competition studies. The scope and timing of competition studies will be defined by their terms of reference.

18. We welcome the provision in the Bill for the Minister to consult with the Commission on the terms of reference for a competition study before a reference is made. This will help ensure that:

18.1 the competition study is well defined to the competition concern and market sector at issue; and

18.2 the reporting date is achievable and can accommodate the Minister's expectations.

19. The Commission also supports being able to self-initiate studies and considers that this brings the proposal into line with international practice, which provides for initiation of competition studies by independent regulatory authorities. In Australia market studies can be initiated by the ACCC, or following a direction from the relevant Minister.

20. In order for the Commission to initiate a competition study, the Bill provides that the Commission must be satisfied that it is in the public interest to do so. The Commission has a steady traffic of, and history of handling, matters touching on the sufficiency of competition in markets. We also have experience in prioritising matters of concern. We believe that we are well-placed to identify markets where the long-term benefit of consumers would be served by undertaking a competition study.

Power to obtain information in a specified usable form

21. We welcome the provisions in the Bill for the Commission to:

    21.1 determine its procedures for carrying out competition studies; and

    21.2 gather evidence, including using the Commission's statutory powers to compel information under s 98 of the Commerce Act.

22. In terms of information, an effective competition study will require:

    22.1 the receipt of relevant information within short timeframes; and

    22.2 that the information is supplied in the most readily usable format.

23. The power to compel information is important for accessing information held by persons or entities who cannot or will not voluntarily provide it to the Commission, or who may not make doing so a priority.

24. The Commission's existing information gathering power under s 98 only enables it to require that information is provided "in the manner specified" by the Commission. However, we submit that s 98 should be amended to make it clear that the Commission has the ability to require that the supplier of information must supply it in a specified useable form or format.

25. The recent MBIE Fuel Market Performance Study was hampered by firms either declining to provide information, or providing information in a form that was not suitable for making ready comparison. In particular, the authors of the study requested that major market participants provide financial data in a manner that would make them readily comparable. However, participants provided data based on their own different accounting practices. The study concluded: [4]

> … given the inherent differences in accounting policies, the level of information provided from each major participant, reporting format, calculation methods and operational structure, it is difficult to obtain fully comparable information for each of the major participants. Accordingly, we have not been able to analyse all of the product types and business channels as specified in the Terms of Reference.

26. We expect that the same issue could arise in competition studies. We therefore submit that it would appropriate to amend s 98 to include a provision similar to s 25(1)(c) of the Financial Markets Authority Act 2011, which relevantly provides that the FMA may require a person to: [5]

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[4] Ministry of Business Innovation and Employment, *Fuel Market Financial Performance Study 2017*, 29 May 2017 at 4.2. See also para. 4.4.1.

[5] Section 25(1)(c) of the Financial Markets Authority Act is otherwise broadly consistent with s 98 of the Commerce Act.

> … reproduce, or assist in reproducing, in usable form, information recorded or stored in any document or class of documents specified in the notice (within the time and in the manner specified in the notice)….

27. We acknowledge that such a requirement may increase the cost of complying with a s 98 notice, where the Commission's requirements differ from the presentation method selected by the information-holder. However, we consider that this simple adjustment to s 98 will be essential to ensuring the timely completion of competition studies that are based on the best available information. The Commission will manage this burden in each study by exercising the power with care, in accordance with the statute's main limitation that any demand for information may only be made to the extent "necessary and desirable", and in accordance with our published guidelines.[6]

28. We also acknowledge that if this extension of s 98 is passed, it will apply to other investigations under the Commerce Act and our other statutes that adopt the s 98 power by reference.[7] We submit that this is appropriate, to modernise our information-gathering powers along the lines described in the Financial Markets Authority Act, and note as above that the power is appropriately fettered by the "necessary and desirable" standard.

Power to compel information from government agencies not in trade

29. The Commission's power to compel information from government agencies is currently limited to crown corporations,[8] and to the Crown to the extent that the Crown engages in trade.[9]

30. Yet government agencies frequently play an important role in markets and often hold significant information relevant to their operation, without being 'in trade.' An agency may, for example, hold information on the history of regulation in its area and the rationale for and success or impacts of the particular regulation adopted.[10] It will sometimes be important to receive this information for the purposes of a competition study.

31. Our ability to effectively conduct a competition study may be frustrated in some markets without the power to compel government agencies, as we will not be able to consider all relevant information when making recommendations.

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6 For example, the Commerce Commission, *Competition and Consumer Investigation Guidelines* 2015, at paras 113 – 142. We anticipate that bespoke Competition Study Guidelines may be issued, which we would expect would deal with matters including information-gathering.

7 Credit Contracts and Consumer Finance Act 2003, s 113, Telecommunications Act 2001, s 15, and Dairy Industry Restructuring Act 2001, s145.

8 Section 6 of the Commerce Act.

9 Section 5(1) of the Commerce Act.

10 An example is our own Regulation Branch, which holds information on a variety of industries such as telecommunications, but is not 'in trade'.

32. In some instances, government agencies are prepared to provide information to the Commission voluntarily, but in other cases agencies are prevented from doing so by confidentiality limitations.

33. In some instances – as with the regulatory example given above – we would not reasonably be able to obtain the information from another source. This may occur where, for example:

    33.1 the government agency compiled, created or summarised information, such as market analysis, that was not held by market participants;

    33.2 the source of the information is not known to the Commission;

    33.3 the government agency deals with overseas entities which are outside our powers; or

    33.4 the original authors are unavailable (for example, unable to be identified or no longer in business).

34. Even where the information can be sourced by other means, in many cases it will be most efficient for us to obtain this information directly from a government agency that holds it in a compiled form. This will assist the timeliness of the competition study, and may reduce the cost on businesses that would otherwise have to reproduce information that they have already supplied to government.

35. Accordingly, we ask that s 5 of the Commerce Act is amended to provide that Crown entities and agencies must respond to a s 98 notice whether or not they are in trade.[11]

36. We note that such an extension would not be unusual amongst regulatory statutes. The Inland Revenue Department, for example, can issue compulsory information notices to other government agencies.[12]

37. We emphasise that, as above, existing safeguards will constrain our exercise of these information gathering powers in the context of competition studies:[13]

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[11] We note that sections 5 and 6 of the Act, and in particular the reference to "crown corporations" does not reflect the language used in the Crown Entities Act 2004. The Committee may consider it appropriate to amend the provisions to provide clarity.

[12] Section 17(1) Tax Administration Act 1994. 'Every person (including any officer employed in or in connection with any department of the government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish any information in a manner acceptable to the Commissioner, and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.'

[13] These are explained, in the context of our existing powers, in our *Competition and Consumer Investigation Guidelines* 2015, at paras 113 – 142.

37.1 we can only issue a s 98 notice for information when we consider that it is "necessary or desirable" for the purposes of carrying out our functions;

37.2 what is necessary or desirable for any competition study would be considered in connection with the Terms of Reference of that study, as well as the applicable timeframes and other available information sources;

37.3 the decision to exercise a power is carefully made by the Commission after reviewing the appropriate information.

38. We acknowledge that the proposed amendment would apply to the exercise of s 98 in relation to our other functions. We consider that this is justified for the same reasons.

Information-sharing with other agencies

39. Our ability to assist with the implementation of competition studies would also be significantly enhanced by a power to share information with other government agencies, particularly those agencies which may assist in or have a role in implementing recommendations made by the Commission.

40. Ultimately, those advising government or implementing recommendations may need to have access to confidential information underlying our recommendations. While this type of information-sharing would be consistent with the public interest and the purpose of the Act, it is desirable that it is expressly authorised, and balanced by appropriate statutory protections.

41. We believe that the existing principles outlined in s 30 of the Financial Markets Authority Act, or s 99J of the Commerce Act, are an appropriate starting point; and that the Commission should be required to consider matters such as:[14]

41.1 whether the release of information would be consistent with the Commission's functions and powers under the Commerce Act;[15]

41.2 whether the Commission is satisfied that any information request is consistent with the powers and functions of the government agency requesting the information; and

41.3 whether the Commission is satisfied appropriate protections over the confidentiality of information will be adopted by the government agency requesting or needing the information.

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[14] Noting the need to take into account that Section 30 of the Financial Markets Authority Act provides for the release by the FMA of information in a different context, to other enforcement agencies including overseas agencies. Section 99J of the Commerce Act provides for the sharing of information only to overseas regulators.

[15] For example, consideration of whether the release assists the Commission in receiving in return information or some other analytical benefit that will help the Commission to exercise its statutory mandate.

42. Further, in order to protect confidential information and ensure that information provided to the Commission will remain confidential if it is shared, we propose to be able to set conditions on the use of information on those we share it with.[16] This would be consistent with the provisions in our Act that permit information sharing with overseas regulators.[17]

43. We therefore recommend that an appropriate information-sharing provision is inserted in the Bill, enabling the Commission to share information.

44. For completeness, we note that we have made a similar recommendation, albeit for slightly different reasons, to the Economic Development, Science and Innovation Select Committee currently considering the Commerce (Criminalisation of Cartels) Amendment Bill.[18]

Use of information obtained by the Commission

45. The Commission's combined functions mean that it will often obtain information for one purpose that proves relevant to our other activities. For example, competition and consumer issues may arise in the same matter, or a competition issue may also impact on regulation. Credit contract investigations frequently give rise to Fair Trading Act concerns.

46. International experience suggests that the Commission may become aware of potential anticompetitive conduct when conducting a competition study.[19] The Commission may then wish to use this information as the basis for investigation and enforcement action.

47. It is important that the statute acknowledges the legitimacy of this intended use. It would be practicably unworkable for Commission members or staff to attempt to put aside what they have learnt, and the organisation is not large enough to segregate teams and members, even if it were thought useful to do so. It would also undermine the greater purpose of a competition study if the Commission were unable to take investigative steps against any anticompetitive conduct discovered during a study.

48. The Commission notes that in the recent decision *ANZ Bank New Zealand Ltd v Financial Markets Authority* [2018] NZHC 691 (now under appeal), Fitzgerald J held that:

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16 See for example, s 33 of the Financial Markets Authority Act.

17 See s 99G(1)(a) Commerce Act 1986.

18 The Commission's submission to the Economic Development, Science and Innovation Select Committee on the Commerce (Criminalisation of Cartels) Amendment Bill proposed the adoption of a similar power to sections 30 to 33 of the Financial Markets Authority Act 2011. These powers would provide a comprehensive and flexible information sharing regime between New Zealand agencies for the purposes of assisting in the long term enforcement of the cartel prohibition.

19 For example, see ACCC Media release, *ACCC calls for greater transparency to assist farmers in the cattle and beef sector*, 7 March 2017.

> "… absent clear wording to the contrary, the purpose for which documents may be compulsorily obtained by a public body will ordinarily limit the purpose for which they can be used and disclosed."

49. We consider that it would be appropriate to give legislative force to the Commission's current practice, as set out in our published guidelines, that we are free to use information gathered for one purpose in pursuing our other statutory functions and purposes.[20]

50. We propose a new section of the Commerce Act to the effect that:

> The Commission may use any information, or a copy of any document, however obtained by it, in the performance or exercise of any of its functions, powers, or duties under this Act or any other enactment.

51. We acknowledge that external parties may consider that this use exposes them to unforeseen action as the consequence of a competition study. That is a potential consequence, but in our view is consistent with the goals of enabling the Commission to undertake competition studies. The Commission would need to have satisfied the "public interest" requirement before embarking on a competition study and the information sought would necessarily fall within the study's Terms of Reference. Accordingly, the information must necessarily pertain to the degree and nature of competition within a specified market. The Commission will, at completion of a study, make recommendations. But we will also be able to commence other legitimate enquiries directed to addressing competition or consumer harm arising from possible breaches of the Acts we are responsible for.

Confidentiality orders over Competition Study information

52. The Commission has the ability under s 100 of the Commerce Act to make orders in the course of carrying out any "investigation or inquiry", which prohibit the publication or communication of information, documents or evidence furnished to the Commission. Such orders are effective to prevent disclosure of Commission-held records, and suspend until the expiry of the order the operation of the Official Information Act 1982.[21]

53. The terms "investigation or inquiry" are not defined with reference to this power.[22] Nor is reference made to suspension of the Privacy Act 1993, alongside the Official Information Act.[23]

54. Accordingly, it is not beyond doubt whether a competition study would fall within the term "inquiry" in s 100, for the purposes of making a confidentiality order.

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20 Commerce Commission, *Competition and Consumer Investigation Guidelines* 2015, at paras 231 – 233.

21 Section 100(1)-(3) of the Commerce Act.

22 "Inquiry" is defined for the purposes of Part 4 regulatory mechanisms, as meaning a Part 4 inquiry carried out under ss 52H-J: s 52C.

23 In contrast, see s 44(4) of the Financial Markets Authority Act 2011.

55. We submit that a clarifying definition should be included, either in s 100, s 48 (Part 3A Interpretation) or in s 2 (Interpretation generally) to the effect that:

> … "**inquiry**" shall include a competition study carried out in accordance with sections 48 - 51D.

56. For completeness, we also submit that the Privacy Act 1993 should be added to s 100 as a disclosure statute the operation of which is suspended until the expiry of a confidentiality order. If the Privacy Act is not suspended then companies who are engaged in a competition study can request all information held by the Commission concerning them. This would defeat the purpose of the s 100 power.

Recommendations that may be made by the Commission

57. We also recommend a clarifying amendment to the wording of the provision in the Bill that empowers us to make recommendations.

58. Clause 4 of the Bill contains s 51B(2), which empowers the Commission to "without limitation, recommend 1 or more of the following" kinds of recommendations. These are contained in s 51B(2)(a) to (f).[24]

59. We understand that the use of the phrase "without limitation" was intended to make clear that the list was not exhaustive, and to leave open the possibility of the Commission making other recommendations (or, importantly, making no recommendations at all). We consider that the current drafting does not make this sufficiently clear, and recommend that provision be amended.

60. Although this could be done in a number of ways, we suggest wording such as:

> Without limiting the contents of any report under section 51B(1), the report may include 1 or more of the following:…

Amendments to strengthen the airports regulatory regime

61. We generally support the changes proposed in Part 2 of the Bill, which amend the regulatory regime for airport services in Part 4 of the Act. We have had the opportunity to provide feedback to the Ministry of Business, Innovation and Employment (**MBIE**) on a number of earlier drafts of the Bill, and accordingly we are broadly comfortable with the current wording in the Bill. We will continue to have discussions with MBIE on other aspects relating to the regulatory regime for airports which have not been addressed in the Bill.

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[24] We note that clause 51B(2) uses "person or organisation" in some situations, and "persons" in others. We are not aware of any reason for the distinction. We consider that 'persons' is sufficient to capture 'organisations,' consistent with the other provisions of the Commerce Act.

62. We support the provisions in the Bill that allow for either negotiate-arbitrate or price-quality regulation to be added to information disclosure regulation for the three main international airports via an Order-in-Council, rather than requiring legislative change. Similarly, we support the new streamlined Part 4 process for the Commission to make a recommendation to the Minister of Commerce and Consumer Affairs to add negotiate-arbitrate or price-quality regulation for airports.

63. We also support the provisions in the Bill that will clarify that we may analyse how effectively our information disclosure requirements are in achieving the Part 4 purpose (as set out in s 52A of the Act), as part of our summary and analysis role under s53(B)(2). We note that this provision will apply equally to information disclosure for regulated electricity lines services and gas pipeline services.

64. We consider that the proposed changes in the Bill are in the long-term interests of the users of the three major airports in New Zealand, and believes that these changes will produce a more effective regulatory regime.

Enforceable undertakings

65. We welcome the proposed introduction of enforceable undertakings into New Zealand's competition law regime.

What enforceable undertakings accomplish

66. Enforceable undertakings are binding, unilateral commitments from a party to the Commission to do (or not do) specific things. If they are breached, we can seek orders from the Court to ensure that the commitments are fulfilled.

67. We agree with the proposal that the Commission may accept enforceable undertakings "in connection with any matter relating to enforcement of [the] Act," whether or not any breach of the Act is thought to have occurred. This allows us to intervene early to secure outcomes such as behavioural or structural change or compensation, to address the identified issues without proof of breach. (See **below** for our submission that the scope of undertakings should nevertheless be extended, to allow for undertakings in connection with s 47 non-notified mergers.)

68. Currently, the Commission may enter into settlement agreements as a means of achieving appropriate outcomes while avoiding the cost and delay of ongoing litigation.

69. However, if the signing party does not comply with the settlement agreement, the Commission must either commence a breach of contract proceeding to enforce the settlement, or commence proceedings in respect of the matters that were originally the subject of the investigation. Both options have potential difficulties, and would invariably initiate a costly and lengthy litigation process.

70. Court enforceable undertakings offer a simpler remedy, as we can apply to the Court to directly enforce the terms of the undertaking.

71. Enforceable undertakings have been available to the Commission for consumer protection matters under the Fair Trading Act 1986 since mid-2014, and have proven to be an effective and cost-effective tool to promote compliance with that Act.

72. Enforceable undertakings are demonstrably flexible. We accept undertakings:

    72.1 as an interim measure during an investigation, as an efficient alternative to seeking an injunction;[25]

    72.2 at the conclusion of an investigation, as part of an enforcement outcome;[26]

    72.3 after the Commission has brought proceedings, as part of the disposition of that proceeding.[27]

73. The primary advantages of enforceable undertakings are simplicity and flexibility:

    73.1 undertakings are a cost-effective and less coercive remedy that are voluntarily offered by the party under investigation;

    73.2 undertakings can be used during and for resolving an investigation;[28]

    73.3 undertakings are directly enforceable if breached; and

    73.4 competition in markets has a complex variety of causes, so undertakings provide scope for the Commission to address the underlying issues that may be limiting competition, not just to seek to punish offenders.

An explicit undertakings power is important

74. As our published guidance records, in some cases we consider that it will be appropriate to accept commitments from parties who may be in breach, instead of taking enforcement proceedings. For example, it may be that undertakings can

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[25] For example, the Commission obtained enforceable undertakings during its steel mesh investigation under which firms agreed to additional testing obligations. This gave the Commission confidence that any offending conduct would cease, without the cost, delay and adverse publicity involved in the Commission seeking injunctions against the firms involved.

[26] For example, in the Commission's Wild Deer Velvet investigation, the sole director/shareholder of the firm undertook not to resume involvement in a company without undertaking appropriate training, and agreed to put in place an appropriate compliance plan.

[27] In *Commerce Commission v Zodiac Motor Company Ltd* [2016] NZDC 25266, the sole director and shareholder of Zodiac Motor Company Ltd gave an undertaking to ensure that any fine imposed on Zodiac would be paid. The Commission considered that there was then no further public interest in the prosecution of the director. Zodiac Motor Company pleaded guilty and was fined $105,000.

[28] We note that once the conditions of a market have changed, such as the result of price fixing, it can be difficult to 'unwind' the anti-competitive effects of the conduct even where a penalty is obtained. Enforceable undertakings can assist in changing the conduct of parties.

secure the immediate cessation of the conduct, together with compensation to affected parties, and can deliver greater benefit to the public than lengthy enforcement proceedings seeking a punitive sanction.

75. The provision of an express power to accept undertakings is therefore very welcome: it resolves any uncertainty arising from the Supreme Court's recent decision in *Osborne & Rockhouse v Worksafe*[29] (condemning Worksafe's settlement of the Pike River criminal proceedings), insofar as that decision might be thought to apply to resolution of enforcement matters by the Commission.

76. To reinforce this necessary clarity, we submit that s 74A of the Bill should be amended to include a provision to the effect that:

> Without limiting section (1) above, the Commission may accept 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, involvement in a contravention, or possible contravention of the Act.

77. Our proposed amendment to the Bill largely adopts s 46A(1)(a) of the enforceable undertakings provisions in the Financial Markets Authority Act 2011, which seems to us a model of clarity on the purpose and extent of undertakings.

Power to accept undertakings should not be limited

78. There is a proposed limitation on the acceptance of enforceable undertakings, which we do not favour.

79. The current Bill only allows enforceable undertakings to be offered to the Commission in relation to "enforcement", such as when investigating restrictive trade practices. In addition, the proposed s 74A(3) when taken together with s 69A of the Commerce Act, would prevent enforceable undertakings being offered for any part of the merger regime.

80. The merger regime has two parts. Parties can voluntarily seek clearance from the Commission, by satisfying us that a merger is not likely to substantially lessen competition.[30] If clearance is declined or not sought, and parties proceed to consummate a merger, the Commission can investigate and prosecute parties under s 47 where the merger is likely to substantially lessen competition.

81. In granting a clearance, we have a limited ability to accept enforceable undertakings under s 69A. The Commission can only accept undertakings if they are 'structural', meaning that the party will divest assets or shares. We are prohibited from accepting other undertakings concerning future conduct, usually referred to as 'behavioural'

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29 *Osborne & Rockhouse v Worksafe New Zealand* [2017] NZSC 175.

30 Section 66 Commerce Act. Alternately, the parties may seek authorisation of a merger that will substantially lessen competition if the merger is of such a benefit to the public of New Zealand that it should nonetheless be authorised under s 67. For the purposes of this paper a reference to a clearance includes an authorisation under s 67.

undertakings (for example, where the parties agree to restrictions on the use or management of assets).We consider that enforceable undertakings should be available without restriction across both sides of merger regime. We propose:

81.1 removing s 74A(3) in the Bill so undertakings can be accepted in connection with the enforcement of s 47; and

81.2 amending s 69A of the current Act to remove the limitations on the types of undertakings that may be accepted in connection with a merger clearance.

Advantages of accepting undertakings in the enforcement of s 47

82. The enforcement of s 47 is precisely where a flexible but certain approach is beneficial to both businesses and the Commission.

83. Whether deliberately or not, mergers that may substantially lessen competition do occur without clearance being sought from the Commission. We can seek an injunction, preventing the merger or requiring that assets be held separate, and can seek orders from the Court for divestment of any acquired assets.

84. But the parties under investigation may be willing to offer the Commission an undertaking to avoid an injunction or divestment orders. Enforceable undertakings offer the parties and the Commission a greater degree of certainty, including over timing and the relevant terms, and are generally less expensive than contested Court proceedings.

85. While these outcomes can be achieved through settlement,[31] for the reasons given above court enforceable undertakings are operationally preferable to settlement agreements.

Advantages of accepting enforceable undertakings in granting clearance

86. The Commission's inability to accept behavioural undertakings in the context of granting a clearance makes the New Zealand merger control regime less flexible than those of overseas counterparts, including Australia.

87. We note that at least one commentator has suggested that the Commission's inability to accept behavioural undertakings was highlighted in the recent Sky/Vodafone merger.[32] This can be contrasted with the 2002 Foxtel/Optus merger, in which the ACCC received undertakings for the merged entity to provide competitors access to certain paid television content on fair commercial terms.

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[31] The Commission entered into a settlement agreement with British American Tobacco in 2003 that required divestment of certain brands. Settlement was only reached after the Commission had filed High Court proceedings against BAT. See Commerce Commission Media Release *Commission agrees out of court settlement with British American Tobacco - includes brand divestment,* 5 February 2003.

[32] S Keene, Russell McVeagh, LEANZ Seminar *Lessons from Voda/Sky – Do we have the right merger control settings for a small open economy*?, 21 November 2017.

88. By amending s 69A of the Act, as well as removing the s 47 limitation (s 74A(3)), behavioural undertakings will be available for the Commission to use consistently across both mergers that are submitted to the Commission for clearance as well as those that are not. This would remove any incentive for merging parties to prefer the section 47 process over the clearance regime if the Commission was only able to accept behavioural undertakings by way of the section 47 process. We consider it would be inequitable for firms that participate in the clearance regime to have fewer options than those that do not.

89. We accept that situations in which behavioural undertakings are acceptable to remedy competition concerns arising from a merger are, following international experience, likely to be limited. We intend to publish guidelines setting out the circumstances in which we may accept enforceable undertakings. Guidelines would support business certainty and mitigate any risk that we expend resources reviewing unsuitable undertakings. These circumstances are likely to include where significant consumer benefits can be expected to arise from the arrangement and limited ongoing monitoring by the Commission is required. This is also the position that has been adopted by overseas competition regulators.

90. While structural undertakings are generally preferred to remedy a merger, behavioural undertakings are a useful addition to our toolkit, with potential benefits for consumers.

Conclusion

91. We welcome the proposal to confer on the Commission a competition studies function.

92. We support the enhanced powers proposed by the Bill, including the ability to accept enforceable undertakings.

93. We seek specific refinements to the Bill to address some areas of uncertainty, and to provide greater cohesion with the existing regime and powers.

94. We support the amendments to the regulatory regime for airport services.

Schedule 1 "Market Study Outcomes"

OECD, 'Guide on Market Studies for Competition Authorities,' 23 May 2018, DAF/COMP/WD(2018)26,Figure 2, p. 18.