

**Review of the Clearance and Authorisation Provisions under the Commerce Act
1986**

SUBMISSIONS ON BEHALF OF AUCKLAND
INTERNATIONAL AIRPORT LIMITED

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1. INTRODUCTION

- 1.1 This submission sets out the views of Auckland International Airport Limited ("**AIAL**") on the Ministry of Economic Development's ("**MED**") Review of the Clearance and Authorisation Provisions of the Commerce Act 1986 ("**Review**").
- 1.2 AIAL holds a unique position in some markets and Part 2 of the Act is a consideration in AIAL's business. Therefore, changes to the clearance and authorisation provisions are of interest.
- 1.3 Some issues dealt with in the Review overlap with issues considered in MED's Review of the Regulatory Control Provisions under the Commerce Act 1986 ("**Act**"). This submission comments on these areas where appropriate. In general, AIAL believes that there should be as much consistency across the various regimes in the Act as possible.
- 1.4 AIAL has no view on issues not discussed in this submission.
- 1.5 No part of this submission is confidential.
- 1.6 AIAL welcomes the opportunity to discuss this submission with MED.

2. CLEARANCE PROCEDURE FOR RESTRICTIVE TRADE PRACTICES

- 2.1 AIAL supports the introduction of a clearance procedure for restrictive trade practices. The Review's discussion document notes that restrictive trade practices can only be authorised at present.
- 2.2 AIAL is always conscious of Part 2 of the Act given its unique position in some markets. As a result, AIAL faces legal risk when considering proposed business practices. In the past AIAL has dealt with this issue in two ways:
- (a) Received legal advice from reputable lawyers and other advisors about the competitive implications of the conduct and its implications under the Act. Of course, such advice is only an opinion and cannot immunise AIAL from legal action as a clearance would; and/or
 - (b) Not undertaken the conduct, which would have presented commercial benefits to AIAL.
- 2.3 A clearance procedure for restrictive trade practices would give AIAL legal certainty over its conduct. AIAL may be able to take more commercially beneficial decisions as a result of a clearance procedure. Currently, AIAL does not undertake these activities due to the risk of breaching Part 2 of the Act.
- 2.4 AIAL notes that certainty is one of the desirable regulatory characteristics noted in MED's discussion document on the Review of the Regulatory Provisions of the Act. AIAL believes that certainty is a desirable characteristic for the legal system generally. A clearance procedure would improve certainty for businesses.
- 2.5 The Review's discussion document suggests that there may be a risk that the Commerce Commission ("**Commission**") would become flooded with clearance applications. This is unlikely to occur. Businesses will not only be unwilling to spend resources applying for clearance of conduct that is not truly marginal, but the Commission's reasons, along with the courts' judgments, will help define and limit the

appropriate circumstances for making a clearance application. The Commission's workload should not be significantly increased over the long term.

- 2.6 The scheme of the Act supports the creation of a clearance procedure for restrictive trade practices. Mergers have the benefit of a clearance procedure. The Act should be as consistent as possible for the different actions that it is applied to.
- 2.7 The Commission has operated the merger clearance regime well and can use this experience when developing its thinking on clearances for restrictive trade practices. The Commission also has experience in restrictive trade practices from its enforcement activities under Part 2 of the Act. Therefore, the Commission's costs are unlikely to increase significantly.
- 2.8 Further, the Commission's enforcement costs may reduce as businesses that fail in clearance applications are unlikely to proceed with the offending conduct.

3. TIME FRAMES AND REASONS FOR CLEARANCE APPLICATIONS

- 3.1 AIAL expects that the form of the clearance procedure used for clearances of restrictive trade practices would be the same as the procedure for clearances of mergers. Therefore, any changes to the clearance procedure for mergers should be reflected in the clearance procedures for restrictive trade practices.
- 3.2 AIAL believes that the Commission should be given a reasonable time frame to conduct an investigation into a clearance application. The time frame should be fixed in the Act and allow the Commission to extend it for the same reasons as deadline extensions for clearances of mergers. The benefit of having a quick process for clearances is the certainty provided to businesses. However, the speed of the process needs to be balanced against the requirement for decisions to be appropriate. There is a trade-off between these two goals. The time frame for the Commission to grant clearances should keep this trade-off in mind.
- 3.3 The Commission should be required to provide reasons for its clearance decisions as they inform the public and assist businesses in assessing future conduct. The Commission has the practice of giving reasons for its decisions following a delay after it has publicly announced its decision. AIAL has no issue with not requiring the simultaneous release of the Commission's decision and reasons. However, AIAL believes that the Commission should be required to publish its reasons. While the Commission currently provides reasons, there is no guarantee that this practice will continue. The Review should provide certainty for clearances into the future.

4. SPECIALIST COMPETITION TRIBUNALS

- 4.1 AIAL strongly supports the creation of a specialist tribunal to deal with all appeals arising out of the Act. AIAL has already submitted that the Commission's regulatory decisions should be subject to merits review as part of the Review of the Regulatory Provisions of the Act. In that submission, AIAL suggested that a specialist tribunal would be ideal but that an appeal to the High Court would also be effective if a specialist tribunal was not created.
- 4.2 There are clear benefits from the creation of a specialist tribunal. For example:
 - (a) The procedural rules can be modified so that they are appropriate for the hearing of competition and regulatory cases allowing for the delivery high quality decisions in a cost effective and efficient manner;

- (b) A different case management process for dealing with competition and regulatory cases could be appropriate, and lead to similar benefits; and
 - (c) Its members will develop expertise. This will increase the business community's confidence in the body.
- 4.3 On this basis, AIAL supports the creation of a specialist tribunal. It is likely to improve the Commission's decisions in both the competition and regulatory areas

5. QUANTIFICATION OF COSTS AND BENEFITS

- 5.1 The quantification of costs and benefits is a difficult task that is of dubious value given the significant value judgements required. One of these value judgements is the time horizon to be considered. In particular, there is no clear point at which a cost or benefit becomes speculative and therefore excluded from the analysis. As a result, it is very difficult for the Commission to weight quantified efficiency effects against other unquantified costs and benefits.
- 5.2 AIAL believes that the Commission should not be required to slavishly apply a quantitative test to assess costs and benefits. Doing so will not necessarily result in the right answers in all circumstances. For example:
- (a) Quantitative analysis will inevitably place disproportionate weight on price because price is more susceptible to quantification. Other issues, such as innovation are more difficult to measure; and
 - (b) Quantification becomes more difficult as time horizons are extended. The purpose of the Act refers to the long term benefit of consumers, which would imply a longer time frame.
- 5.3 AIAL is not suggesting that the Commission's analysis of costs and benefits should be any less rigorous than it is currently. As noted by the Court of Appeal, there are benefits to quantification and it should remain a useful as part of the Commission's analysis.¹ However, quantification should not be the only nor determinative part of the analysis.
- 5.4 This approach towards quantification of costs and benefits has the advantage of being consistent with the approach towards quantification of costs and benefits AIAL has suggested under the regulatory provisions of the Act. AIAL believes that the Act, and the Commission's approach towards applying the Act, should be as consistent as possible.

6. CONCLUSION

- 6.1 The changes proposed to the clearance and authorisation regime are significant.
- 6.2 AIAL supports the inclusion of a clearance procedure for restrictive trade practices as it will improve certainty for businesses. Businesses should be able to check if a proposed practice is lawful. This has the potential to allow businesses to make commercial gains from conduct which was legally risky prior to the clearance. Any changes to the clearance procedure for mergers should follow through to the clearance procedure for restrictive trade practices.

¹ *Telecom Corporation of New Zealand Ltd v Commerce Commission* (1992) 3 NZLR 429, 447.

- 6.3 Certainty would also be improved by requiring the Commission to publish the reasons for its decisions. The Commission does this at the moment, but is not required to by the Act. Further, time frames for the Commission's decision must take into account the need for a speedy resolution of the application and also allow the Commission to come to the right answer.
- 6.4 A specialist tribunal dealing with competition and regulatory matters is desirable as it allows expertise to be concentrated and for procedures to be adopted that reflect the needs of hearing competition and regulatory appeals. As previously stated, appeals from the regulatory parts of the Act should be allowed and considered by the same tribunal.