

25 July 2016

**Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Enterprise**

By email: commerceact@mbie.govt.nz

Dear Sir/Madam,

Targeted Review of the Commerce Act 1986: Air New Zealand cross submission

Thank you for the opportunity to participate in the Ministry's cross-submission process in relation to the Targeted Review of the Commerce Act 1986.

Air New Zealand's views have not changed from those set out in our submission of 24 March 2016. However, we have set out below some brief observations on the possible reform of section 36 following a review of the submissions to date.

Australian experience: Submitters make a number of references to the Harper Report and the importance of aligning section 36 with its Australian equivalent, which is expected to be amended shortly. While Air NZ is generally in favour of trans Tasman alignment we would caution against blindly following the Australian lead in this area. Given the significance of the change and the number of different views on whether change is necessary, an alternative approach would be to observe the effect of any change in Australia before making a decision on reform in New Zealand. This worked well in relation to the Cartel Bill, where the model proposed has been well received compared with the earlier reform undertaken in Australia.

Examples: the examples the Commission uses in its submission of 2 June do not support the reform of section 36:

- in two of the examples no substantial lessening of competition (under section 27) was found, and in the other it was not considered. There is no suggestion that these examples would have been decided differently under an amended section 36.
- A number of submitters state that the current section 36 requires too much emphasis on 'hypothetical scenarios' and assumptions, and is difficult to apply. The Commission describes the Origin Pacific/Air New Zealand investigation as "tortuous" and the analysis as "hypothetical". As set out in our earlier submission, Air New Zealand does not agree with the view that the current section 36 is unworkable given clear guidance from both the Privy Council and the Supreme Court on the appropriate test. Many submitters appear to confuse a (justifiably) high standard with a level of complexity.

- Even if it is correct that the current section 36 is difficult to apply, a change to an effects based test is no silver bullet to this problem. A number of submitters (including some who support reform) agree that an effects based test would not be simple to apply in practice. As set out in our submission, an effects based test requires a business to look beyond its own intentions and strategies, which are certain, and predict the effects of its conduct against what might have occurred in the absence of the proposed conduct, including on potentially unpredictable competitors and in changing market conditions.

The Commission criticises submitters for not providing examples of procompetitive conduct that they could not undertake with a reformed section 36. However, a number of submitters have clearly articulated why reform could lead to a chilling effect on procompetitive conduct. Nor have submitters suggested that section 27 is a “perfect substitute” for section 36. It does, however, act to alleviate some of the concerns raised by the Ministry regarding the current section 36.

Options for reform: A number of submitters suggest that New Zealand (and Australia) are outliers in relation to the way that unilateral conduct is treated. However, as set out in our submission, there is a broad spectrum against which unilateral conduct is measured, even amongst those jurisdictions that have an effects-based test. While Air New Zealand favours the current section 36, we note that a number of submitters have suggested reform of section 36 which resolve a number of perceived issues with the current provision, while retaining the current purpose element. If the Ministry does not see fit to retain section 36 in its current form, we would support these alternatives (see, for example, the suggestions of Bell Gully (submission of 9 February) and ANZ (submission of 9 February 2016)).

Submissions from business: We would be concerned if any negative implication is taken from the Commission’s statement that “[p]erhaps unsurprisingly, those resistant to reform are large businesses and the advisors that represent them”. Large business are most likely to comment given that any unintended consequences of the reform will disproportionately impact them and their ability to compete. They also have more experience in working with section 36, whether as the actual or potential subject of a market power allegation, or the purported victim of one. This makes them well placed to comment on the effect of any reform. Air New Zealand, for example, works with a number of airports whom we view as having market or monopoly power in relation to the services they provide to us.

Thank you again for providing us with the opportunity to respond to the Commission’s Report. Please feel free to contact the author, or John Blair (General Counsel) at john.blair@airnz.co.nz if you wish to discuss this submission further, or to seek Air New Zealand’s view on any other issues.

Regards



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