



COVERSHEET

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In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Cabinet Economic Development Committee

Review of Section 36 of the Commerce Act and Other Matters: Policy Decisions

Proposal

1. This paper seeks agreement to strengthen the Commerce Act 1986's prohibition against anti-competitive unilateral conduct, repeal provisions of the Commerce Act that shield some intellectual property arrangements from competition law scrutiny, and make other minor changes to improve the functioning of competition law.

Executive Summary

2. Section 36 of the Commerce Act 1986 (**the Act**) prohibits firms with substantial market power from taking advantage of their market power for an exclusionary purpose. It is intended to prevent firms with market power from harming competition by engaging in conduct such as exclusive dealing, refusal to supply, or predatory pricing.
3. The current section 36 – in particular, the 'take advantage' test – has been interpreted by the courts in a way that:
 - 3.1. has the potential to fail to deter or penalise some forms of anti-competitive conduct by firms with substantial market power;
 - 3.2. is costly and complex to enforce; and
 - 3.3. arguably creates unpredictability for day-to-day business decision-making.
4. In January 2019, the Ministry of Business, Innovation and Employment released a discussion paper which consulted on options for reforming section 36, alongside other issues relating to the Act's treatment of intellectual property (**IP**) and land covenants.
5. On the issue of section 36, the discussion paper proposed that, like Australia, New Zealand should prohibit firms with market power from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. This would focus the prohibition directly on the anti-competitive nature of the conduct, and is likely to significantly decrease the cost and complexity of enforcement.
6. Feedback on this proposal from submitters was mixed. Those opposed to reform highlighted a range of concerns, including that there is little evidence of a problem, that an Australian-style approach would chill competition and investment, and that it could result in pro-competitive conduct breaching the law. I generally consider that

these concerns are overstated, and intend to proceed with amending section 36 in line with what was proposed in the discussion paper.

7. To the extent that there are risks with reform, I consider that these are outweighed by the potential benefits, namely a general increase in the level of competition in concentrated markets over time, with likely flow-on benefits in terms of increased productivity and efficiency, lower prices, and higher quality goods and services.
8. Alongside this change, I propose to allow parties to seek authorisation from the Commerce Commission for conduct that may contravene section 36, but which is in the public interest. Subject to consultation with the Australian Government, I also propose to align section 36A, which relates to trans-Tasman anti-competitive unilateral conduct, with the amended section 36.
9. In addition to the issue of section 36, I propose to repeal the Act's provisions relating to IP, which shield some IP arrangements from competition law scrutiny. I consider that the current provisions are outdated, unnecessary and poorly understood.
10. I also propose to make technical changes to the treatment of land covenants under the Act, standardise and clarify the Act's treatment of anti-competitive conduct relating to land, increase penalties for businesses engaging in anti-competitive mergers, increase the maximum number of Commerce Commissioners from six to eight, and allow the Commission to share information gathered as part of investigations with other agencies.

Background

11. The Commerce Act 1986 (**the Act**) seeks to promote competition in markets for the long-term benefit of consumers. It does so by (amongst other things) prohibiting:
 - 11.1 anti-competitive agreements, such as price-fixing and output restrictions;
 - 11.2 anti-competitive mergers; and
 - 11.3 anti-competitive unilateral conduct (also known as misuse of market power).
12. In January 2019, the Ministry of Business, Innovation and Employment (**MBIE**) released a discussion paper [CAB-18-MIN-0434 refers] titled *Review of section 36 of the Commerce Act and other matters*, which proposed strengthening New Zealand's prohibition against anti-competitive unilateral conduct. This followed a 2015 issues paper released by the previous Government, which also considered the issue of section 36, amongst other matters. The 2019 discussion paper also proposed repealing the provisions of the Act that have the effect of shielding some intellectual property (**IP**) arrangements from competition law scrutiny, and proposed some technical changes relating to the treatment of land covenants.
13. 29 submissions were received on the 2019 discussion paper from a number of businesses, industry organisations, competition- and/or IP-focused law firms, and other bodies such as the Commerce Commission and Consumer NZ.
14. This paper seeks policy decisions in relation to these matters, as well as a small number of other issues that officials have identified.

Section 36 of the Commerce Act

Background

15. Across jurisdictions, anti-competitive unilateral conduct prohibitions typically seek to prevent firms with market power from harming the competitive process by maintaining or extending their market power in a way that limits the ability of other firms to compete, and in turn reducing the benefits to consumers and the economy associated with competition. Anti-competitive unilateral conduct can lead to higher prices, lower quality goods and services, and weak incentives for investment and innovation.
16. Anti-competitive unilateral conduct provisions are intended to address conduct such as:
 - 16.1. **Exclusive dealing:** This is where a powerful business has contracts with retailers, distributors, or suppliers that require or induce them to only sell that business's products or only supply that business. This may be harmful if the arrangement denies a competitor access to an important supply or distribution channel.
 - 16.2. **Refusal to supply:** This occurs where a vertically-integrated business refuses to supply a competitor with an input (e.g. a raw material), or to give access to infrastructure (e.g. port services) that the competitor needs to compete in downstream (e.g. retail) markets.
 - 16.3. **Predatory pricing:** This is where a business lowers its pricing with a view to pushing a competitor out of the market. To be unlawful, it needs to occur over a sustained period and the price charged must be below cost, with it being likely that the business will increase its prices again after the competitor exits.
17. Anti-competitive unilateral conduct provisions are generally aimed at prohibiting exclusionary conduct (i.e. conduct that makes it harder for other businesses to compete on their merits) by firms with market power. They generally do not seek to prevent:
 - 17.1. **Businesses innovating or reducing prices to pass on cost savings and efficiency improvements:** Such conduct is pro-competitive and generally benefits consumers, even if it results in less efficient firms exiting the market.
 - 17.2. **Firms holding a monopoly position in a market or charging high prices to customers:** Short-term monopolies may arise from innovations or technological advances. High prices in such circumstances are part of the normal competitive process and send a signal to other businesses to expand or enter the market. Where such issues persist, these are best addressed by other means (such as by reducing barriers to entry), or, in cases where market entry is not likely (such as for electricity distribution or fixed-line broadband), by directly regulating businesses' revenues.
 - 17.3. **Powerful businesses negotiating hard deals with their suppliers (or vice versa):** This is because suppliers and their business customers are generally not in competition with each other, and therefore suppliers have no incentives

to harm competition in their customers' market. These issues will be addressed to an extent through forthcoming amendments to the Fair Trading Act 1986 to prohibit unfair commercial practices.

18. Section 36 currently prohibits firms with a substantial degree of market power from taking advantage of that power for the purpose of:
 - 18.1. restricting the entry of a person into that or any other market;
 - 18.2. preventing or deterring a person from engaging in competitive conduct in that or any other market; or
 - 18.3. eliminating a person from that or any other market.

The problem

19. The current section 36 – in particular it's 'take advantage' test – has been interpreted by the courts in a way that creates a number of problems. In particular, the courts have required a 'causal connection' between a firm's market power and its conduct. The courts have ruled that a firm only takes advantage of its market power (and thus breaches the Act) if a business without substantial market power (but otherwise in the same circumstances) would not have engaged in the same conduct.
20. In my view, the 'take advantage' test leads to three main problems with section 36:
 - 20.1. **It has the potential to fail to deter or penalise some forms of anti-competitive conduct.** Some types of conduct (such as exclusive dealing) can harm competition when engaged in by a firm with market power, but are also commonly engaged in by firms without substantial market power, without harming competition. The current section 36 will likely fail to prohibit such conduct, since firms may engage in the conduct regardless of whether they have substantial market power.
 - 20.2. **It is costly and complex to enforce, which reduces the incentives for businesses to comply with the law:** In enforcing section 36, the 'take advantage' test requires the development of a complex 'hypothetical counterfactual' market, in which the firm in question does not have market power. Developing such a hypothetical market takes significant time and resources, reducing the likelihood that the Commerce Commission (or private parties) will take legal action.
 - 20.3. **It creates some unpredictability as to the outcome of the prohibition:** The take advantage test requires a number of (potentially arbitrary, unrealistic and/or subjective) assumptions to be made about what a hypothetical market in which the firm in question did not have market power would look like. The assumptions used for the hypothetical market can determine whether or not the conduct in question breaches section 36. In my view, this makes the current prohibition relatively unpredictable in terms of its application.
21. Concerns with the outcomes produced by section 36 have existed for more than two decades, largely as a result of the Privy Council's interpretation of the provision in a

case in the mid-1990s.¹ There have been multiple legislative and non-legislative attempts to influence the direction of the courts since then, all of which have been ultimately unsuccessful. Overall, the current interpretation of the prohibition presents risks that some anti-competitive conduct will not be illegal, that – even if conduct is illegal – no enforcement action will be taken, and that – even if enforcement action is taken – that such action will not be successful.

Proposal

22. In response to the issues identified with section 36, I propose to amend the provision to prohibit firms with a substantial degree of market power from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market. This is effectively the approach adopted by Australia when it reformed its equivalent provision in 2017, and was the initial proposition set out in the 2019 discussion paper.
23. This would focus the prohibition directly on the anti-competitive nature of the conduct (as opposed to whether a firm without market power would have engaged in the conduct, as at present), and is likely to significantly decrease the cost and complexity of enforcement. Fundamentally, it would mean that firms would not be able to engage in conduct with the purpose or effect of substantially lessening competition, regardless of whether they would have engaged in the same conduct if they did not have substantial market power. In considering whether conduct substantially lessened competition, courts would be able to take into account any pro-competitive effects of conduct, such as efficiency gains passed on to consumers (i.e. it is the net impact on competition that would be assessed).
24. This change will deliver a strong unilateral conduct prohibition, which is a critical element of competition law, and will support the Government's goal of a more productive, sustainable and inclusive economy. The direct benefits of reform will be difficult to measure, but over time are likely to include a general increase in the level of competition in concentrated markets, with flow-on benefits in terms of increased productivity, innovation and efficiency, lower prices, and higher quality goods and services.
25. I also propose that parties be allowed to seek authorisation from the Commerce Commission for conduct that may contravene section 36, but which is in the public interest. The current authorisation process under the Act does not extend to conduct captured under section 36.
26. As is currently the case, breach of this prohibition can result in pecuniary penalties of up to \$500,000 for individuals, and for anyone else, the greater of \$10 million, three times the value of any commercial gain from the contravention, or, if the commercial gain is unknown, ten per cent of turnover of the business in question. Other remedies, such as injunctions and damages, would also be available, as at present.

Response to stakeholder concerns

27. Proposals to reform section 36 are controversial amongst competition lawyers and the large businesses that would be directly impacted by reform. Of the 23 submitters

¹ *Telecom Corp of New Zealand Ltd v Clear Communications Ltd* (1994) 5 NZBLC 103,552; [1995] 1 NZLR 385 (PC), with a similar approach endorsed by the courts in later decisions.

on the 2019 discussion paper, seven were broadly in favour of reform, eight were broadly neutral, and eight were broadly opposed to reform. Submitters on the 2015 issues paper were similarly divided.

28. Stakeholders in favour of reform largely share my view of the problem, and consider that section 36 is likely to under-capture in respect of some forms of anti-competitive conduct, that it is costly and complex to enforce, and that New Zealand is an outlier internationally in terms of the design of our prohibition.
29. Those opposed to reform have raised a number of arguments in favour of the status quo, including that:
 - 29.1. There is little evidence of anti-competitive conduct going undeterred.
 - 29.2. The current prohibition is predictable and easy for businesses to apply in their day-to-day decision-making.
 - 29.3. Any reform would chill competition and investment by slowing down decision-making, increasing compliance costs, and introducing uncertainty and ambiguity.
 - 29.4. Reform could result in pro-competitive conduct (such as price decreases as a result of efficiencies that lead to competitors exiting the market) being treated as breaches of the law.
30. In terms of evidence of the problem, anti-competitive conduct can be difficult and resource-intensive to detect and analyse, and the Commerce Commission has rightly argued that it should not be expected to keep a record of conduct which does not breach the current prohibition, but which might breach some future, hypothetical prohibition. In any case, there are good theoretical and practical reasons to believe that the current prohibition is not fit-for-purpose.
31. I also generally consider that the concerns about reform are overstated. I recognise that there is nothing in the wording of the proposed prohibition that would clarify that it is targeted at *exclusionary* conduct (conduct that makes it harder for other businesses to compete on their merits). This means that there are some forms of conduct that could, on the face of it, appear to breach the prohibition, despite not having an exclusionary purpose. However, I consider it unlikely that the courts would treat pro-competitive conduct (such as price reductions or quality improvements that result from efficiencies and innovation) as a breach of the prohibition, even if it results in competitors exiting the market. This is because the prohibition is intended to focus on the competitive process, not the number of competitors in a market. Other examples that have been raised by stakeholders, such as a firm with market power potentially contravening the Act just by withdrawing from a market, are similarly unlikely to be a breach, as they would not make it harder for other firms to compete or enter the market.
32. A revised section 36 may impose additional costs on businesses, as firms would need to conduct a self-assessment as to the possible effects of a range of conduct. It is also possible that the uncertainty associated with reform could lead to businesses acting overly conservatively and in a compliance-focused manner to avoid any risk of contravening the prohibition. However, the proposed section 36 also shares a

number of similarities to other aspects of the Act, such as the prohibition against anti-competitive agreements (in particular by relying on the same ‘substantial lessening of competition’ test). Given this, many businesses and their legal advisors are already familiar with the concepts in the proposed prohibition. These risks will also lessen once case law has developed, and risk-aversion should be constrained by commercial incentives that are likely to encourage businesses to continue to compete aggressively within the limits of the law.

33. To the extent that there are costs and risks associated with reform, I – and presumably many of the stakeholders in favour of reform – think that these are likely to be outweighed by the potential benefits described above.

Other options considered

34. To address the risks outlined above, I considered adopting what is, in effect, a simplified version of Canada’s anti-competitive unilateral conduct prohibition. This would require the Commission or an affected firm to prove that a firm was engaging in conduct that had an exclusionary purpose, and had, or was likely to have, the effect of substantially lessening competition in a market. The intent of this option would be to reduce any risk of inadvertently capturing legitimate, non-exclusionary conduct, or of businesses acting overly conservatively. However, I consider that these potential benefits would be outweighed by the risk that the prohibition would be more difficult to enforce (although likely still easier than the status quo). I also consider that there is benefit in aligning New Zealand’s prohibition with Australia, as would be the case under what is proposed.
35. Stakeholders suggested a number of other options for reform which I did not consider to be viable. Some of these options are briefly discussed in the Regulatory Impact Statement accompanying this paper.

Section 36A

36. As part of the Closer Economic Relations review in 1988, the Australian and New Zealand governments agreed to remove protections against dumping (the situation where a business sells its goods at a cheaper price in a foreign country than its home country) for goods traded across the Tasman. Instead, reliance was placed on generic competition law to protect against conduct such as predatory pricing (which can be a factor in dumping). To enable this, section 36A was inserted into the Act to enable consideration of market power in Australia or a trans-Tasman market. The theory is that firms with market power in Australia could leverage that power in New Zealand and vice versa. The Australian legislation was amended with an equivalent provision.

International relations

Intellectual property

Background

38. Presently, the Commerce Act contains three provisions that govern how IP rights are treated under the Act:
 - 38.1. Section 45 exempts the granting of IP licences (to the extent that they authorise something that would otherwise be prohibited by the existence of a statutory IP right) from provisions of the Act relating to cartels and anti-competitive agreements.
 - 38.2. Section 36(3) provides that a firm does not breach section 36 solely by enforcing an IP right.
 - 38.3. Section 7 provides that the Act does not limit any law relating to breaches of confidence (such as sharing trade secrets), and that no law relating to breaches of confidence affects the interpretation of any of the provisions of the Act.
39. These (and equivalent overseas) provisions were introduced because, in the early-mid 20th century, IP rights and competition law were seen as being incompatible with each other. In particular, because IP rights can, in effect, grant a limited monopoly to the rights holder, it was thought that there was little point in granting IP rights if these would immediately breach competition law.
40. Over time, this view has changed and it is now generally accepted that IP rights and competition law are complementary. Licensing or assigning IP rights usually encourages competition and future innovation, and IP rights do not usually create substantial market power in the competition law sense. For example, a musician might have copyright over an individual song or an album, but the courts have ruled that the relevant 'market' under competition law is the overall New Zealand album market, not the market for the individual album.² Given this, it can be argued that IP arrangements should be able to be scrutinised under competition law like any other form of arrangement. Australia has recently repealed its equivalent provision, and other jurisdictions such as Canada, the United Kingdom, and the United States do not have equivalent exemptions, or have narrower exemptions than New Zealand.

The problem

41. While the vast majority of IP arrangements do not create competition issues, some IP arrangements can be anti-competitive. Such arrangements are potentially sheltered from New Zealand's competition law at present, and officials have been made aware of current conduct which is potentially anti-competitive where this may be the case.
42. In addition to the possibility of anti-competitive IP-related conduct going undeterred, the current IP provisions are very unclear as to their scope, and draw arbitrary

² *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352 (CA).

distinctions between statutory and common law IP rights. The Commerce Commission has investigated cases involving IP before – indicating that not all IP-related conduct is exempt from the Act – however the exemptions have gone almost entirely untested in the courts. This means that even with the IP exemptions in existence, they arguably provide little certainty to rights holders.

Proposal

43. I propose to repeal each of the Commerce Act's IP provisions. This will be accompanied by an appropriate transitional period, to give affected businesses time to review their IP arrangements.
44. Repeal of the IP provisions will help to ensure that the benefits associated with competition law scrutiny are shared across the economy, including markets where businesses create or make heavy use of IP. Anti-competitive IP-related conduct can have the same negative effects as other forms of anti-competitive conduct, including by raising prices and restricting choice for consumers. While anti-competitive IP arrangements are unlikely to be prevalent, where they do occur, it is important that they can be remedied in the same way as conduct in relation to other forms of property.
45. The practical impact of this proposal on most businesses that create and license IP should be low, as the majority of IP-related conduct is not likely to raise competition concerns. To the extent that licensing arrangements come within the Act's cartel provisions, they would generally fall within an established exemption. Nevertheless, this proposal will require businesses to assess their existing IP arrangements to ensure compliance. To the extent that these arrangements are anti-competitive, businesses will need to make amendments.

Response to stakeholder concerns

46. Like section 36, the proposal to remove the IP exemptions is controversial, particularly among IP lawyers and firms with IP-heavy business models. Of the 14 submitters to the 2019 discussion paper who addressed the issue of IP rights, two were broadly supportive of repeal, five were broadly neutral, and seven were broadly opposed to repeal.
47. Amongst other objections, those opposed to repeal of the exemptions have argued that:
 - 47.1. There is no evidence of a problem at present.
 - 47.2. Repealing the exemptions would reduce incentives to innovate if businesses felt that they had to license their IP to other parties.
 - 47.3. Repeal of the provisions would result in uncertainty and costly litigation.
48. Despite the concerns raised by stakeholders, as discussed above, I am confident that repeal should have little impact on most IP arrangements, or on incentives to innovate and invest. Recent guidance produced by the Australian Competition and Consumer Commission in response to the repeal of Australia's equivalent IP exemption has recognised the important role that IP rights play in incentivising

innovation, and confirmed that most IP arrangements are unlikely to be viewed as raising concerns under competition law.

49. Should the IP provisions be repealed, I would expect the Commission to provide guidance about its approach to IP arrangements under the Act. I anticipate that this would be similar to the Australian guidance, and this should help to address any business uncertainty associated with reform.

Other matters

Covenants

50. The Act defines covenants as relating to land. A covenant on land generally restricts the way in which that land can be used. For example, a supermarket may place a covenant on the sale of its surplus land to prevent that land from being used for a competing supermarket. Depending on the specific circumstances, such as the availability of other suitable land, this covenant might impede competition.
51. In 2017, when the Act's price fixing prohibitions were repealed and replaced with new cartel prohibitions, covenants were inadvertently excluded from the new prohibitions. This was an oversight, rather than any change in the policy position. The impact of this is that covenants which create or implement a cartel will not 'automatically' be prohibited in the same way that standard cartel agreements are, making the prohibition harder to enforce and meaning that the forthcoming criminal penalties for cartel conduct will not apply. I propose to close this loophole and restore the pre-2017 position of covenants being treated equivalently to contracts under the Act.

Treatment of land

52. As currently drafted, different provisions of the Act treat issues relating to land inconsistently, and somewhat ambiguously. Anti-competitive conduct is only prohibited in relation to the supply or acquisition of goods or services; land is not specifically mentioned. However, the definition of 'services' includes "rights in relation to, and interests in, real or personal property". In other parts of the Act, land is mentioned separately to goods and services, which has led to some disagreement about the scope of the Act in relation to land.
53. The courts have recently stated that the Act's definition of service does include land³, but I nevertheless consider that there may be merit in some drafting amendments to the Act to provide for a more consistent treatment of land. In particular, the Act should be clear that collusion or exclusionary conduct in relation to rights or interests in land is unlawful in the same way as for other property. My intent is to clarify the treatment of land under the Act, rather than to substantively extend the Act's scope.

Penalties for anti-competitive mergers

54. The Commerce Act prohibits business mergers and acquisitions that would substantially lessen competition. It provides for a voluntary clearance (for mergers that would not substantially lessen competition) and authorisation (for mergers that would substantially lessen competition, but are justified on other public interest

³ *Commerce Commission v Ronovation Limited* [2019] NZHC 2303 at [16].

grounds) regime, under which mergers that are cleared or authorised by the Commission cannot be challenged as a breach of the Act.

55. The maximum penalty for an anti-competitive merger or acquisition is currently \$500,000 for individuals and \$5 million for anyone else (e.g. companies). This maximum penalty has been unchanged since 1990, and compares to a maximum for other forms of anti-competitive conduct of up to \$500,000 for individuals, and for anyone else, the greater of \$10 million, three times the value of any commercial gain from the contravention, or, if the commercial gain is unknown, ten per cent of turnover of the business in question.
56. Since the beginning of 2018, the Commerce Commission has undertaken investigations into eight possibly anti-competitive mergers for which clearance or authorisation was not sought. This suggests that the current penalties for anti-competitive mergers are not acting as a sufficient deterrent. I propose to increase maximum penalties for anti-competitive mergers and acquisitions, to align them with the maximum penalties for other breaches, as set out above.

Number of Commissioners

57. The Act provides that the Commerce Commission must have between four and six 'full' Commissioners (i.e. board members) at any one time. There may also be any number of Associate Commissioners. Given the steady increase in the Commission's functions over time, and the significant role Commissioners have as statutory decision-makers, constraints on the number of Commissioners can lead to delays in decision-making and high workloads for the incumbents.
58. To date, I have sought to address these issues by appointing additional Associate Commissioners. However, I consider that it would be useful for there to be flexibility to appoint additional full Commissioners to manage the workload and bring a wider mix of skills and experience to the Commission's decision-making. For example, full Commissioners have governance responsibilities under the Crown Entities Act, whereas Associate Commissioners do not. Flexibility to appoint an increased number of full Commissioners could therefore provide greater depth to the Commission board's governance role. Given this, I propose to increase the maximum number of Commissioners from six to eight (while retaining the minimum number at four). The decision regarding whether to actually appoint additional Commissioners would be a separate one.

Information sharing

59. Given the Commerce Commission's broad, cross-economy remit, its activities can overlap with those of other New Zealand government agencies or regulators, or it may unearth information in the course of an investigation that may be of relevance to another regulator. Currently, the Commission's ability to share information that it obtains – particularly information of a confidential nature – is uncertain. Where information is not able to be shared, it can result in duplication of effort, impede regulatory cooperation and coordination, and lead to under-enforcement of the law.
60. The Privacy Act 1993 and the Official Information Act 1982 provide mechanisms that allow for information to be shared between government agencies and regulators. However, the Privacy Act is concerned with personal, rather than commercial,

information. In any case, the bilateral information sharing agreements that it provides for are not well-suited to the Commission, given the wide range of agencies that it may need to deal with from time to time. I do not consider the Official Information Act to be an appropriate mechanism for facilitating cooperation between government agencies and regulators.

61. It is common for other regulators to have specific provisions in their governing Acts that provide that they can share information with other government agencies or regulators. This includes legislation such as the Financial Markets Authority Act 2011 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. While the Commerce Commission has the ability to share information with the Financial Markets Authority and the Takeovers Panel in relation to its activities under the Fair Trading Act, this does not extend to its Commerce Act functions.
62. Given this, I propose to amend the Commerce Act to provide that the Commission may share information that it holds in relation to its functions under the Commerce Act, or any other Act that it enforces, with other government agencies or regulators. This would be subject to safeguards relating to the use and storage of the information. Existing information sharing provisions that overlap with this provision (such as the one contained in the Fair Trading Act) would be repealed.

Consultation

63. The Treasury, Ministry of Justice, Ministry for Primary Industries, Ministry of Foreign Affairs and Trade, and the Commerce Commission have been consulted on this Cabinet paper and the attached Regulatory Impact Statement. The Department of the Prime Minister and Cabinet has been informed. The Office of the Privacy Commissioner has been consulted on the information sharing proposal.
64. The main proposals in this paper were consulted on publicly through a discussion paper. Further information on submitters' perspectives is available on the MBIE website and is included in the Regulatory Impact Statement accompanying this paper.

Financial implications

65. The changes proposed in this paper are unlikely to have significant financial implications for the Commerce Commission. It is possible that extending authorisation to conduct captured under section 36 could result in increased costs for the Commission, as current fees only recover a small proportion of the Commission's costs for assessing authorisation applications. However, it is difficult to predict with any degree of certainty the number of authorisation applications (if any) that the Commission is likely to receive. The increase in the cap on the number of Commissioners will not have any financial implications unless additional appointments are made. These implications will be considered at that time.

66. Confidential advice to Government

Legislative implications

67. The proposals in this paper will require legislation. A Commerce Amendment Bill to implement these proposals has a Confidential advice to Government on the 2020 Legislation Programme.
68. I propose that the Amendment Act will bind the Crown to the extent that it engages in trade, consistent with current provisions in the Commerce Act.

Impact analysis

69. The impact analysis requirements apply to the proposals in this paper. A Regulatory Impact Statement has been prepared and is attached.
70. MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Statement prepared by MBIE. The Panel considers that the information and analysis summarised in the Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Human rights

71. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Publicity

72. I intend to publicly announce policy decisions shortly following Cabinet approval.

Proactive Release

73. This paper will be proactively released on MBIE's website within 30 business days of Cabinet making decisions, subject to redactions as appropriate, consistent with the Official Information Act 1982.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

1. **note** that in January 2019, MBIE released a discussion paper titled *Review of section 36 of the Commerce Act and other matters* [CAB-18-MIN-0434 refers], which proposed strengthening the prohibition against anti-competitive unilateral conduct (section 36), repealing the Act's intellectual property provisions, and technical changes relating to covenants;

Section 36

2. **note** that 23 submissions were received on the issue of section 36, with stakeholders relatively evenly divided between being for, against, or neutral towards reform;
3. **agree** to amend section 36 of the Commerce Act to prohibit persons with a substantial degree of power in a market from engaging in conduct that has the

purpose, or has or is likely to have the effect, of substantially lessening competition in a market;

4. **agree** that authorisation from the Commerce Commission be available for conduct which may breach section 36, but which is ultimately in the public interest;

5.  International relations

Intellectual property

6. **note** that 14 submissions were received on the issue of repealing the safe harbours for intellectual property, with most stakeholders either neutral or opposed to reform;

7. **agree** to repeal the safe harbours for intellectual property in sections 45, 36(3), and 7(2) of the Act, and in section 7(3) to the extent that it relates to intellectual property;

8. **invite** the Commerce Commission to prepare guidelines on its enforcement approach in relation to intellectual property under the Act once amended;

Other matters

9. **agree** to prohibit covenants that create or implement a cartel, in the same way as contracts;

10. **agree** to amend the Act to clarify that the Act's provisions relating to anti-competitive conduct apply to interests in land, without substantively extending the Act's scope;

11. **agree** to increase the maximum pecuniary penalties for anti-competitive mergers to align with those relating to anti-competitive agreements contained in section 80 of the Commerce Act 1986;

12. **agree** to increase the maximum number of Commerce Commissioners from six to eight;

13. **agree** to amend the Act to provide that the Commission may share information that it holds in relation to its functions under the Commerce Act, or any other Act that it enforces, with other government agencies or regulators, subject to safeguards relating to the use and storage of that information;

Legislative implications

14. **agree** to give effect to the above proposals through a Commerce Amendment Bill, which has a Category 4 (to be referred to a select committee in the year) on the 2020 Legislation Programme;

15. **invite** the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above recommendations;

16. **authorise** the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes, consistent with the policy intent of this paper, on issues that arise during the drafting process;

Communications

17. **note** that the Minister of Commerce and Consumer Affairs will publicly announce policy decisions following Cabinet approval.

Authorised for lodgement

Hon Kris Faafoi

Minister of Commerce and Consumer Affairs

PROACTIVELY RELEASED