3 February, 2016

Submission to:

Targeted Commerce Act Review

This submission:

This submission of the Building Industry Federation (BIF) on the Targeted Commerce Act Review is directed at mooted changes to Part II of the Commerce Act, primarily in Section 36 addressing misuse of market power. That provision prohibits a firm with a substantial degree of market power from taking advantage of that power for the purpose of preventing, deterring or excluding competition. Section 36(1) is broadly similar to section 46(1) of the Australian Competition and Consumer Act of 2010.

The BIF believes a change in the Act as suggested would:

- Diverge New Zealand's commercial rules away from Australia which is counter to CER;
- Introduce an element of unnecessary confusion in the market place by comparison with the existing situation;
- Overturn well-established case law supporting a clear definition of a breach of the statute through "taking advantage" of a market power; and
- Discourage innovation and enhancement of consumer welfare by introducing additional risks in undertaking pro-competitive conduct.

Position:

The BIF supports a competition policy regime which is efficient and effective in setting and administering rules for market conduct for the protection of consumers and the encouragement of innovation within the business environment. It is our view that competition policy must be set with due regard for the business environment and limitations placed on business activities by such factors as geographical constraints, population size and other governmental policies which impact on individual sectors to which it applies. We can see no documented evidence in the Ministry's document that the current law is failing. There is mention of "failing to punish anti-competitive conduct by powerful firms", such as at page 31, but there is no evidence that anti-competitive conduct a) exists and b) is not being deterred by the lack of an "effects" test. In the absence of such evidence it is difficult to identify an appropriate gap in the law requiring change.

It is our view that:

Adding an effects test to that of "purpose" in Section 36 would:

- Introduce a significant risk that legitimate pro-competitive conduct could be outlawed because of a lack of weight attributed to factors relevant to the decision making that led to the conduct under scrutiny, including other regulatory settings.

- Create uncertainty in the business decision making environment which could lead to a reluctance to innovate, may stifle competition and over time adversely affect consumer welfare and the pro-competitive process.
- Place New Zealand companies in a more uncertain development or expansion situation by holding over them the threat of action in circumstances in which the success or failure of their decision is wholly dependent on the reception of the market to which they bring new or innovative products or materials.

General

The BIF considers that the existing law works well. Market investigations currently take place through the Commerce Commission. The results provide guidance that encourages compliance. For example, the examination under existing law of Winstone Wallboards in 2014 which concluded with an investigation closure report (ICR) dated 22 December 2014 provided useful findings that industry appreciates. The BIF has no quibble with the use of market studies as a mechanism for the assessment of competitiveness in markets, but does not see good cause for more comprehensive scope than clearly already exists. In particular, we do not believe that such power as exercised by the Commerce Commission should be delegated to Government ministries or departments.

We understand the view that an effects test would apply to and may capture behaviour with an adverse impact on competitors but the proposed change carries with it a risk of an unintended consequence of promoting inefficient businesses offering, thus far, less consumer-favoured goods. The focus of Section 36(i) would likely shift from that of conduct for a specific purpose to that of conduct with a proscribed effect. Businesses would be required to change their decision making processes. Instead of simply focussing on decisions intended to decrease prices, provide better service and engage consumers with lower pricing, all of which benefit consumer welfare, they would have to give consideration in each of these areas to the consequences of steps taken on the level of competition in the market. In this way, in our view, businesses that may have upper level market share due to their goods being well-favoured by consumers, would be required to become both a commercial entity and an assessor of the likely impact of their actions on competitors and competition in the market. It is often difficult to fully predict the consequences of an action or decision taken by a company on either competitors or competition. Thus, a business may compete less strongly than it otherwise would in order to ensure that it is not at risk of being in breach of the law and suffering potential reputational damage.

It is apparent that purpose, intent or businesses' justification, whether subjective or inferred from conduct and circumstances, are used in many countries throughout the world to distinguish vigorous, legitimate competition from anti-competitive misuse or abuse of market or monopoly power. There is, in our view, no conflict between current New Zealand law and that of our partners in the prospective Trans-Pacific Partnership, particularly the U.S. We are informed that in the U.S it is not subjective intent but objective intent that Courts consider is relevant. Intent can be inferred from conduct and effect. The Australian Government has thus far opted not to introduce an "effects" test. We note that under CER and its accompanying memoranda [1], The New Zealand and

[1] http://dfat.gov.au/trade/agreements/anzcerta/Pages/memorandum-of-understanding-between-the-government-of-new-zealand-and-the-government-of-australia-on-the-coordination-of-bu.aspx That memorandum replaces the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law signed on 22 February 2006.

Australian governments have committed to achieving a single economic market in which there is no significant discrimination in the Australian and New Zealand markets arising from differences in the policies and regulations of both countries.

More specifically, under CER Australasian commerce is to anticipate substantively the same regulatory outcomes in both countries, and a firm will only have to comply with one set of rules and will have certainty as to the application of those rules by the regulator (i.e. Australian or New Zealand) with which it needs to deal. There appears little to commend the paper's desire for alignment with jurisdictions such as the US and China, yet at the same time diverge NZ's law from Australia where, as identified above, deep protocols supporting the opposite approach are of near 30 years standing.

That noted, may we suggest the Ministry defer its proposal to change the New Zealand Commerce Act until the outcome of the current Australian review of section 46(1) of the Australian Competition and Consumer Act 2010 is known. New Zealand commerce does not anticipate that the New Zealand government will diverge its section 36 away from Australia's section 46.

The New Zealand Building Industry Federation is representative of the supply chain of the New Zealand building industry. Its membership of some 140 companies is drawn from merchants, manufacturers, importers and marketers of building products and materials.