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21 July 2016

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Ministry of Business, Innovation & Employment
Competition & Consumer Policy
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To whom it may concern

Meredith Connell cross-submission on *Targeted Review of Commerce Act 1986 Issues Paper*

1 Introduction

1.1 Meredith Connell welcomes the opportunity to provide a brief cross-submission on the submissions made on the original Ministry of Business, Innovation & Employment's (**MBIE**) Targeted Review of the Commerce Act 1986 Issues Paper. Our comments focus on responding on those topics which formed a core part of our original submission, in particular:

(a) the case for reform of s 36; and

(b) reform of the settlements regime.

2 The case for reform of section 36

2.1 At the outset, we note and respectfully endorse the comments of Alan Lear, a specialist competition lawyer with significant experience advising commercial clients:

> [T]he take advantage element has, as a result of successive court decisions, morphed into one that requires complex, costly and contestable analysis being undertaken. … I seriously doubt if it provides business certainty *ex anti* as to whether its conduct is competitive or exclusionary. The resulting high litigation risk is stacked against the Commission or private plaintiffs and this allows dominant firms to get away with exclusionary conduct except that of the most egregious in nature. Therefore I now believe the prohibition needs to be re-cast and the logical replacement is an effects based test which is used elsewhere in the Act and overseas. I believe such an approach should be more straight-forward and understandable for business managers to apply *ex anti*.

2.2 Unsurprisingly, the critics of the case for reform of s 36 referred to the following broad reasons for refuting the need for change (or variations thereof):

(a) the lack of certainty created by reform, leading to a potentially chilling effect on competition;

(b) the lack of evidence that the current regime does not work; and

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(c) the unique nature of New Zealand's small market, and the preponderance of dominant firms in important markets, dilutes the case for change.

2.3 These arguments have been effectively addressed by Dr Berry's letter to MBIE of 2 June 2016, as follows:

(a) there is simply no evidence that reform will chill competitive conduct;

(b) submitters who disclose a view that there is no problem with the enforcement of s 36 may be correct from a large firm perspective, but there is a lack of consideration of the arguments from an enforcement perspective; and

(c) New Zealand's competition laws and economy proceed on the basis that our scarce resources are best allocated in an effective economy; it follows that there is ample justification for a regime which effectively deters unilateral conduct that by its very nature can seriously undermine competition.

2.4 We endorse those comments and would add that although New Zealand's economy is small, there has in our view been no adequate justification proffered for why that should tell against reform of s 36. Further, it is perhaps not surprising that the opponents of reform are unable to identify any evidence of a "chilling effect" when the possible reforms would bring New Zealand competition law into closer alignment with dynamic economies such as the United States. As the International Bar Association's Antitrust Committee said in its submission (p 2):

> [T]he general trend internationally is a move away from focusing on purpose to an assessment that focuses on conduct with a material anticompetitive effect which does or would adversely affect competition and the competitive process, rather than simply on the purpose/aim or form of such conduct.

2.5 Russell McVeagh's submission further suggests (at paragraph 2.3(b)) that the current wording of s 36 is already aligned with practice in the United States. This is incorrect, for the reasons forcefully explained by several United States academics in concluding that the counterfactual test as applied in New Zealand is not an effective enforcement tool and is significantly out of step with United States law and practice.[1]

2.6 Several submitters suggest that the discussion in the Issues Paper fails to adequately address the interplay between s 27 and s 36.[2] We disagree. While both provisions are directed towards the same general goal of protecting competition, the two provisions reflect the fundamental need in any competition regime to proscribe anti-competitive *agreements* (especially, but not solely, between competitors), and anti-competitive *unilateral conduct*. For example, there is no suggestion that *Data Tails* could have been instituted as a s 27 claim. Because s 27 is focused at a different mischief, it cannot be expected to fulfil the role of effectively proscribing unilateral conduct.

2.7 We are also surprised by the position taken by some submitters that the counterfactual test is simple and provides certainty. The reality is that the counterfactual test requires a complex hypothetical analysis with serious analytical deficiencies. The Court of Appeal in *0867* highlighted these difficulties:[3]

> This case exposes the realities of the difficulty of counterfactual analysis and that it is not always of utility in the context of a case such as the present. The reality of the case is that it

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1 JM Cross, JD Richards, ME Stucke and SW Waller "Use of Dominance, Unlawful Conduct and Causation under Section 36 of New Zealand's Commerce Act 1986: A United States Perspective" (2012) 18 NZBLQ 333.

2 See for example DLA Piper's submission at [3] and Russell McVeagh at [2.3](b).

3 *Commerce Commission v Telecom NZ Ltd* [2009] NZCA 338, (2009) 12 TCLR 457, at [100].

is about terminating charges which are markedly above cost and the willingness of Telecom, under threat of regulation, to share its monopoly rents with Clear. Any realistic counterfactual must take monopoly rents as a given. It is difficult to see how there can be any plausible counterfactual about the distribution of monopoly rents where non-dominance has to be assumed: in the absence of dominance there can be no monopoly rents.

2.8 The Supreme Court in *0867* was likewise obliged to embark on a hypothetical exercise involving expert economic evidence as to how firms "X" and "Y" could or would act, and the Commission's case ultimately failed because of an absence of evidence concerning the posited hypothetical scenario. What is entirely absent from the Supreme Court's consideration is any direct consideration of whether Telecom's conduct harmed competition. The failure of s 36 to require any such analysis underlines the shortcomings with the counterfactual test.

2.9 Submitters correctly identify that the small nature of New Zealand's economy creates a haven for markets which are dominated by one or two firms. It follows that New Zealand may have a greater concentration of one or two firm-dominated markets than its overseas counterparts. Quite why that should deter New Zealand from reforming section 36, as was submitted by some, is unclear. If MBIE determines that s 36 in its current state is inadequate to capture unilateral anti-competitive conduct, it should be reformed, regardless of how many firms are potentially within the provision's reach.

2.10 Ultimately, the key issue is the extent to which s 36 as currently worded and applied aligns with the objectives of the Act of promoting competition in markets "for the long-term benefit of consumers within New Zealand" (s 1A). For the reasons set out in a number of submissions, s 36 as currently worded asks the wrong question – instead of asking whether unilateral conduct harms competition (as would the wording proposed in the Harper Report), it requires a hypothetical analysis based on contested assumptions about how a hypothetical competitor may have acted. In our view, this is deeply unsatisfactory. The current wording of s 36 is not fit for purpose.

3 The settlements regime

3.1 As submitted during the first round of submissions, we believe MBIE's issues paper did not appropriately focus on the benefits and effectiveness of the current settlements regime. Many submitters have expressed similar views.

3.2 However, there were some specific submissions made on ways to potentially reform the settlements regime that we consider are worthy of comment:

(a) **Creation of a settlements regime which enables parties to not admit breaches**: One submitter expressed the view that the nature and scope of admissions are often a sticking point in enabling settlements. Settlements would be more cost and time effective if parties were not required to admit breaches. While that might be a pragmatic response for private parties engaged in a private dispute, it is entirely inconsistent with the purpose of a regulator and belies the point of an enforcement regime.

(b) **The Commission should be required to provide the full details of its case and evidence prior to filing:** This approach is impractical and unnecessary, and would unduly favour the interests of well-resourced corporate defendants. Civil proceedings filed by the Commission, as with any litigant, are already subject to the general rules requiring a plaintiff's case to be fully pleaded and accompanied by initial disclosure of relevant documents. Further, proceedings will occur only after investigations conducted by the Commission, which will already have given affected parties full and fair notice of the conduct alleged. Potential defendants will have participated in interviews and viewed key documents and evidence against them. Recent proceedings issued by the Commission

show that this is more than sufficient for parties to consider and undertake meaningful engagement in settlement discussions before the Commission files proceedings. Providing for some sort of bespoke formal pre-discovery process would be burdensome, unnecessary in view of the ordinary regime for civil litigation, and would inevitably hold up the settlement process for those parties who truly want to admit liability (and receive the greatest credit) at the earliest opportunity.

3.3 We also note that some submitters favoured enforcement mechanisms which offered a more private mode of resolving disputes, outside the purview of the media. Denunciation and general deterrence of anti-competitive conduct are pillars of an effective enforcement regime. Any measures which move towards a less transparent regime of resolving disputes, chip away at the ability of the regulator to appropriately enforce anti-competitive conduct; an outcome we regard as undesirable. Openness and transparency are essential for the Commission to effect its statutory mandate.

4 Conclusion

4.1 We are grateful for the opportunity to make this cross-submission on the Ministry's *Targeted Commerce Act Review Issues Paper*, and trust the Ministry finds it of assistance. Should you want to discuss any aspect of this submission further, please do not hesitate to contact us.

Yours faithfully
Meredith Connell

Leo Farmer | Kim Francis
Partners