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Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
WELLINGTON

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1. Introduction

1.1 This letter is Tompkins Wake's cross-submission on the possible reform of s 36 of the Commerce Act 1986 (the **Act**). We have read the submissions available on MBIE's website, and this letter sets out our response.

1.2 Tompkins Wake is a nationally-focussed, full service law firm. We regularly advise clients on a full range of competition law matters.

1.3 We would be happy to discuss our views further with MBIE staff. Any requests for further information or specific questions related to this submission should be directed to:

Edward Willis
Senior Associate

2. Summary

2.1 This submission focuses on the legal aspects of possible reform. This is a perspective that has not received serious treatment to date, but is important for contextualising many of the competing claims that have been put forward as part of the submission process.

2.2 Our submission does not address directly the policy question of where to draw the line between acceptable and unlawful unilateral conduct. The competing arguments on this point have been sufficiently elaborated in the submissions MBIE has already received.

2.3 The key points of our cross-submission are:

(a) Certainty is valuable, and should be promoted regardless of the underlying economic policy position.

(b) As currently drafted and applied, s 36:

(i) provides a high degree of confidence *ex ante* that certain conduct will not meet the threshold for unlawfulness; but

(ii) is acutely uncertain with respect to conduct at the margin.

(c) This acute uncertainty occurs because, on its current application, s 36 allows the courts to avoid engaging with meaningful economic analysis.

(d) This acute uncertainty warrants reform even if there is no intention to change the underlying economic policy.

(e) Addressing this acute uncertainty requires promoting cogent economic analysis by the courts. Effective competition law requires the courts to be confident using economic theory and evidence to apply the law to the specific facts of individual cases.

(f) Consistent, cogent use of economic analysis by the courts:

(i) promotes greater accuracy in the application of the underlying economic policy, which assists the Commerce Commission as the relevant enforcement agency; and

(ii) promotes greater *ex ante* certainty in respect of the application of the law at the margin, which benefits those commercial enterprises that must consider s 36 as part of their business decisions.

2.4 We also set out some drafting considerations that should inform any amendment to s 36(2).

3. Legal Certainty

3.1 Certainty in the interpretation and application of the law is valuable as a matter of legal principle. The predictability that results from legal certainty is valuable in and of itself because of the confidence it provides to those subject to the law and the respect it engenders towards the legal system as a whole. Accordingly, certainty and predictability should be promoted by well-drafted legislation regardless of the underlying economic policy position.

3.2 We recognise that no area of law can be 100% certain. There will always be a need for judgement to be exercised, especially in difficult cases. That said, competition law is one area where a high degree of reasonable predictability is desirable and achievable. Both the underlying economic policy (that is, where the threshold is set for unlawful conduct) and the way that policy is applied in practice should be tolerably clear on the face of the legislation.

3.3 One consequence of focusing on certainty as a matter of legal principle rather than economic policy is that adequate predictability of the law may be an issue that warrants reform even if MBIE reaches the view that changes to the economic policy underpinning s 36 are not necessary.

3.4 MBIE has received a number of submissions suggesting that s 36 promotes certainty for businesses making investment or other commercial decisions.[1] This certainty is, however, a kind of *de facto* certainty that results from the adoption of a particular policy that the threshold for unlawful conduct should be set at a very high level. Whether that

1 For example, Bell Gully *Bell Gully submission to MBIE – Targeted Review of the Commerce Act 1986: Issues Paper* (9 February 2016) at paragraph [3.2].

policy position can be credibly sustained turns solely on the economic evidence. Appeals to 'certainty' in this context merely presuppose the economic policy position without suggesting a justification for it. This type of certainty could never form the basis for an argument either for or against reform on substantive policy grounds.

3.5 In all material respects, the law relating to unlawful unilateral conduct in New Zealand is acutely uncertain. Despite the limited *de facto* certainty it purports to offer, it is impossible to predict with any degree of confidence whether, on its current application, the counterfactual test would determine conduct at the margin to be unlawful. For this reason, we agree with the Commerce Commission that application of s 36 can be difficult and controversial to apply in practice.[2]

3.6 A key reason that this acute uncertainty occurs is that the counterfactual test as currently applied by the courts allows the courts to avoid engaging with meaningful economic analysis. As drafted, the "takes advantage" language in s 36 is ambiguous as to whether counterfactual analysis is intended to be a vehicle for cogent economic analysis, or simply a means of addressing the legal issue of causation in an unsophisticated, 'but for' sense. It is no real surprise that cases that treat counterfactual analysis as an opportunity to robustly explore and test economic theory are received more favourably by objective commentators than cases where the analysis never moves beyond 'but for' causation.[3] The inability to anticipate which direction a deciding court might take means any s 36 action is, essentially, a lottery.

3.7 The inability for businesses and their advisors to predict in advance whether a court will be inclined to adopt a legal as opposed to an economic framework for analysis (or vice versa) is, in our view, the central reason for difficulty in the application of s 36. On balance, we consider that the high level of uncertainty that an ambiguous test creates to be so acute and intractable that it sufficient to warrant reform even if there is no intention to change to the underlying economic policy.

4. Benefits of Cogent Economic Analysis

4.1 Tompkins Wake does not consider that counterfactual analysis is inherently flawed, and our views differ from those of the Commission in that respect. However, counterfactual analysis is only valuable to the extent it promotes consistent, cogent economic analysis by the courts. That is because effective competition law requires the courts to be confident using economic theory and evidence apply the law to the specific facts of individual cases.

4.2 Consistent, cogent use of economic analysis by the courts has two key benefits that any reform of s 36 should seek to secure:

(a) First, it promotes greater accuracy in the application of the underlying economic policy. This is the case regardless of the specific economic policy position that the legislation adopts. Whether a 'purpose'-based test is retained or an 'effects'-based test adopted, a requirement for the courts to engage with economic analysis encourages consistency and accuracy over time. This assists the Commerce Commission as the relevant enforcement agency and benefits consumers as application of the law is consistent with the underlying policy intent.

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2 Commerce Commission *Targeted Commerce Act Review* (2 June 2016).

3 Compare, for example, the inquiry of the Court of Appeal into economic substance in *Telecom Corporation of New Zealand Limited v Commerce Commission* [2012] NZCA 278 (*Datatails*) with the perfunctory, legalistic judgment of the Supreme Court in *Commerce Commission v Telecom Corporation of New Zealand* [2010] NZSC 111 (*0867*).

(b) Second, cogent use of economic analysis by the courts promotes greater *ex ante* certainty in respect of the application of the law in terms of the most difficult cases. While complete certainty is neither possible nor desirable as a policy goal, where the application of the law is underpinned by a clear and consistent economic rationale predictability will be greatly improved. This meaningful increase in certainty benefits those commercial enterprises that must consider s 36 as part of their business decisions and allows markets to operate more smoothly.

5. Legal Policy Considerations – The Role of the Courts

5.1 We believe that one key barrier to achieving these benefits in practice may be prevailing institutional perceptions of the proper role of the courts. There is an argument that a more legalistic approach to questions of causation and market harm is adopted where the courts consider that they may be over-stepping their traditional role by engaging directly with economic evidence.

5.2 We have some sympathy for this perspective. We do not consider it appropriate for the courts to be determining questions of economic policy. Rather, a principled approach to the issue requires that:

(a) Economic policy is determined legislatively by Parliament. This links competition law with the best available policy analysis and societal views on the tolerance for potentially harmful market conduct. It also provides the most effective means of promoting accountability for these policy decisions.

(b) Application of that economic policy to the facts of novel or contentious cases is within the ambit of the court's traditional adjudicatory function. This suggests a clear although limited role for economic theory and empirical evidence before the courts to determine the implications of specified economic policy for particular sets of facts. This economic evidence is in fact vital for a full understanding of the complex behaviour that can arise in a wide variety of market contexts.

5.3 Ambiguous legislative drafting – such as the "takes advantage" language in s 36 – risks delegating the role of economic policy-making to the courts in a way that is inconsistent with this principled model. In order to give effect to that vague legislative instruction, the courts must exercise their own judgement as to where the threshold for intervention should be set. This approach to competition law is ill-suited to both the institutional role of the courts in a Parliamentary democracy and effective implementation of economic law.

5.4 The courts are likely to exercise more confidence and sound judgement where the underlying economic policy is clear. In that case there is no risk of the courts overstepping their traditional function. Any reform of s 36 therefore needs to make clear that the role of economic theory and empirical evidence is to enable application of the law to the facts, not to re-litigate economic policy settings that are enshrined in legislation.

6. Drafting Considerations

6.1 This submission has deliberately not engaged with the merits of substantive reform on questions of underlying economic policy. If a case for a lower threshold for unlawful unilateral conduct is accepted by MBIE, then there is scope for substantial redrafting

of s 36. In the absence of a commitment to a specific policy position it is difficult to give drafting advice, but we would urge that the legal principles and considerations set out in this submission inform that redrafting process.

6.2 If the current high threshold for unlawful unilateral conduct is maintained, then the aim of legislative drafting should be to promote more consistent, cogency economic analysis on the part of the courts while retaining the basic structure of the legal tests that currently apply. Reliance on the "substantial lessening of competition in a market" formulation as used in ss 27 and 47 may introduce more consideration of economic effects into the courts' reasoning, but is likely to alter the current threshold for intervention because it opens the sphere of inquiry beyond exclusionary conduct as conventionally understood.[4] In any case, we consider that this formulation should be resisted to avoid the perverse result that harmful conduct in markets with little or no competition (because of the presence of a vastly dominant competitor) might fall outside the scope of s 36.

6.3 In our view, an express reference to the market effects of impugned unilateral conduct is likely to be sufficient to prompt the courts to engage with the economic substance of the question they have been asked to address. This approach would link the ambiguous "take advantage" language to a need to consider economic analysis. It would also bring some uniformity with the other operative provisions of the Act while retaining those aspects that mark s 36 as conceptually distinct.

6.4 On that basis, if incremental rather than wholesale reform is adopted, we would recommend that s 36(2) be amended so that it reads:

> **36 Taking advantage of market power**
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> […]
>
> (2) A person that has a substantial degree of power in a market must not take advantage of that power for the purpose, *or with the effect or likely effect*, of:
>
> (i) restricting the entry of a person into that or any other market; or
>
> (ii) preventing or deterring a person from engaging in competitive conduct in that or any other market; or
>
> (iii) eliminating a person from, or substantially damaging a person operating in, that or any other market.

4 This point is made at length in Russell McVeagh *Submission to the Ministry of Business, Innovation & Employment: Targeted Review of the Commerce Act 1986* (9 February 2016).