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Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
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By Email: commerceact@mbie.govt.nz

Targeted Review of the Commerce Act 1986

Thank you for offering me the opportunity to comment on the Issues Paper related to the above-mentioned review.

As you will see from my attached paper, I am supportive of s.36 being amended and strengthened, the Cease & Desist procedure being retained but refined, and for the Commission being given powers to carry out market studies (but without mandatory information gathering powers). I do not think enforceable undertakings are necessary add on for out of court settlement agreements.

Please contact me if any clarification is required.

Yours faithfully

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Section in Issues Paper (IP)	Comment
Anti-competitive exclusionary conduct	
2.1 Matters at Issue	1. I agree that the Issues Paper (IP) accurately summarises the main categories of exclusionary conduct that should be within the scope of s36 scrutiny. I have not researched whether they are typically prohibited in other countries but I am aware that the US position is unclear in relation to refusals to deal and margin squeeze situations. Moreover, the recoupment of losses in predatory pricing situations might not be required in other countries.
2.2 Benchmark of approaches to anti-competitive exclusionary conduct	2. I have not recently researched the approaches taken to determine exclusionary conduct in the EU or US but nothing in the IP appears to be inaccurate as a brief summary. Assuming it is correct, the comparison being made is instructive as suggests that NZ's taking advantage element is required because of s.36 having a purpose only test. If NZ moves to an effect test as in other countries, a strict taking advantage causal link should is no longer be required (or only in a watered down form) as the existence or not of competitive harm can be tested for in another ways.
2.3 The NZ regime	3. I agree that the IP accurately summarises the main elements of s.36 as they are applied in NZ. 4. I have long been a supporter of the take advantage/ purpose only combination as providing (in theory) the right filters to help distinguish between conduct that is competitive and that which is exclusionary. However, the take advantage element has, as a result of successive court decisions, morphed into one that requires complex, costly and contestable analysis being undertaken. While I do not disagree with the courts' logic behind the taking advantage approach, 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*. 5. As noted above, the take advantage enquiry (whether the firm "would have" acted in a competitive market in the same way) is conceptually consistent with having an anti-competitive purpose element – both involving (often impugned) intent. As the IP records, the courts have not experienced much difficulty finding the requisite anti-competitive purpose – it tends to naturally flow from a (rare) taking advantage finding and can be inferred from the likely effects of the conduct in question. As large firms tend to provide compliance training, it would be rare to uncover anti-competitive statements recorded in documents. The purpose element has become an artificial construct and as the IP notes, our courts are already being drawn to look at the likely effects the conduct will have on competition. 6. I think s.36(1) is fine in that it simply resolves any possible conflict situation where something that has been authorised is subsequently alleged to be in breach of s.36(2). Nevertheless, I believe a conflict situation is unlikely to arise where the authorisation was fully investigated and properly determined, but it gives certainty just in case there is an overlap. Adding an effects test to s.36 should help to mitigate any perceived tension.

2.4 Framework for assessment	7. I have no disagreement or further comment to make in terms of the criteria to be applied. 8. In my opinion, the first two (long-term benefit of consumers and simplicity) should have equal weight and the remaining two (alignment and small economy) are possibly less important. Having said that, I do not believe the application of s.36 can be made "simple" as it needs to address complex issues in unique fact situations.
2.5 Assessment of the New Zealand regime	9 As competition in non-concentrated markets can range from nothing up to being ferocious, using that as a comparator will likely produce type 2 errors in situations where consumers are likely to miss out on the benefits workable competition would produce (e.g. lower prices) because a market powerful firm will likely retain control of the market. So I agree that s.36 may not be working in the long-term benefit of consumers. 10. I have doubts as to whether most managers of market powerful firms are able to confidently make the same judgement calls about what would a non-powerful firm do in the same circumstances given the amount and type (e.g. economic) information a court normally requires to make such decisions. The design of the hypothetical workably competitive market, in which the incumbent is denied all aspects of market power, but otherwise in the same circumstances, will be instrumental to the outcome. Such assessments are complex and open to different points of view. Persons who have worked for lengthy periods in market powerful firms may be conditioned to that business environment and have a limited feel about life in a competitive market. Through no fault on their part, they may honestly believe what they are doing is "normal" or "good business practice" when it is not and are exposed to risk. However, they should be better able to assess what effects certain conduct will have on a competitors and thus competition generally. 11. I agree that the taking advantage element of s.36 has become too complex and has consequentially increased the evidential burden and litigation risk on the Commission and plaintiffs to the point that s.36 cannot be appropriately enforced. 12. I agree that particularly when comparing the per se offences (cartel and RPM) against how s.36 is being enforced, there is a large misalignment. This is because a large penalty can be imposed on small and medium sized firms for breaching a per se section of the Act even though there is no or only a minor effect on competition. Yet where 'rigorous' conduct by a market powerful firm is found to be the same as would occur in some hypothetical competitive market, the impact that conduct has on competition (or future competition) in an actual market is irrelevant no matter how great or long term it could be (which is likely given a market powerful firm facing limited or no competition exists to start with). There is also a misalignment with the SLC based provisions as effects or likely effects of the arrangement or merger have on actual markets are at the forefront. 13. In my view, because NZ is remote with a small economy, it needs a (more) robust s.36 to help ensure all sectors are efficient and competition is renowned to be the most reliable means to achieve that. 14. As noted above, I think the Ministry is on the right track in terms of its discussion of the issues. 15. Not applicable.

	16. As already noted, I am in general agreement with the Ministry's conclusion and have nothing further to add to save repeating myself. 17. I have nothing further to add at this time.
2.7 Potential options for reform	18 While I believe it is clear that the current s.36 has problems controlling exclusionary conduct by powerful firms, the solution is not so clear and a well-researched Options Paper is required. It is important that powerful firms are not prevented from competing and utilising their relative advantages in doing so but a limit needs to be set that balances that against conduct that unnecessarily harms what are already competitively fragile markets. Following on from my earlier comments, I think the take advantage and sole purpose elements should be replaced with an appropriately calibrated effects test and possibly a defence to mitigate any 'chilling' of the deployment of otherwise efficient and pro-competitive initiatives. Nevertheless, I believe all the options listed in table 3 should be examined in the Options Paper so informed comparisons can be made. 19. If a clear response to this Review is that s.36 is currently not achieving the Act's objectives, the Ministry may reasonably not include the "status quo" as an option requiring further consideration. 20. I have further options to offer. 21. I think the principles set out in section 2.4 are also adequate for the Options Paper.
Alternative enforcement mechanisms	
3.1 Matters at Issue	22. As to delay, I think there is a difference between High Court proceedings seeking an injunctive relief to stop anti-competitive conduct, and enforcement proceedings brought by the Commission. Commerce Act related injunction proceedings are rare but (as in the case of other proceedings) in urgent situations, court fixtures should be available within a reasonable period of time. Working within the Commercial list, a motivated plaintiff can bring the proceedings to a full hearing at a reasonable pace subject to hearing time being available. Enforcement proceedings by the Commission tend to take much longer as there is normally no urgency (defendants usually cease what they were doing) and Commission only normally files proceedings after a lengthy investigation. Contested court proceedings are very costly in terms of legal fees, expert fees and as a result of the cases being lengthy and complex. However most cartel enforcement cases which make up the bulk of proceedings under the Act, are settled (sometimes because the penalty will be less than the likely cost to defend) which substantially reduce enforcement costs on both sides. 23. I have not researched enforcement procedures in other jurisdictions but the Ministry's summary looks adequate to work with. 24. I agree that the alternative enforcement mechanisms in NZ are as summarised in the IP. 25. I have no issue with the framework criteria as listed in section 3.4. 26. Not applicable. 27. I am not aware of that the Commission has faced a situation where the settling party has defaulted in a material way but the Commission is better

	placed to confirm or otherwise this. I would be surprised that a settling party would ever contemplate breaching an agreement. The agreement could contain a waiver of the limitation section enabling the Commission could bring proceedings for a breach, even if out of time. Enforceable undertakings would strengthen settlements but I am unsure whether such is required. 28. Based on its lack of use to date, I agree the C&D regime has not worked as intended. The Commission is better placed to advise why it has not used C&D over the years. A contributing factor may be that s.36 is hard to enforce so those situations do not go to C&D. Another reason may be that the Commission achieves a change in conduct in most cases merely by threatening to go to C&D or issuing proceedings. Finally, the criteria to satisfy are set higher than required to obtain an interim injunction from the High Court. 29. I think the Commission should use the C&D procedure more than it has, assuming it has appropriate cases to put before it. The criteria might first require some refinement. This is because it can offer a specialist and more streamlined process that should lower costs. 30. The current 'out of court' settlement's regime is relatively simple and cost effective for dealing with minor or in doubt breaches of the Act. The Commission has the clear upper hand when negotiating and it needs to act with restraint so not to impose unfair terms on parties. 31. I believe the C&D has the potential to be more cost effective and timely than High Court proceedings. I would expect in many cases, the Commission and the respondent would lawyer up (including senior counsel) but the process should be truncated if before a specialist commissioner. In terms of predictability, much will depend on the selection of the Commissioners. 32. I do not have any natural justice concerns with either mechanism. 33. As noted earlier (¶22), applications for interim injunctions should be able to be heard on an urgent basis by the High Court. However, the lack of cases means we do not know this for sure. The Auckland and Wellington courts may be better positioned to meet such demand and they also have the advantage of having judges available that have a working knowledge of the Act to which such cases can be allocated. That may not be the case in other regions and the Ministry may wish to look into this further. 34. Adding Court enforceable undertakings to the settlements regime brings the Act into greater alignment with the Fair Trading Act (which is perhaps the better Act to align with) but I am not sure there is a need for it in the first place (as noted earlier ¶27). 35. As enforcement of the Commerce Act can be quite complicated, I think there is a role for a more specialist regime that C&D can provide, as an option to High Court proceedings. 36. C&D is a duplicate process as currently drafted (perhaps more so where defendant firms are located in Auckland or Wellington) for interim injunctions. It might be used more by the Commission if s.36 were to be amended. 37. No additional comment. 38. No comment. 39. As noted earlier ¶27, I do not see there is a need for enforceable undertakings but if the Commission can show it has faced problems in the past,

	then I am relaxed about an amendment being considered further. Such a change might give rise to issues as to what should be made the subject of undertakings (as they could bring about an ad hoc trade practice regime), what happens if market conditions change and their duration. Furthermore, if they contain enforceable undertakings, can they be enforced by private parties and should they all be made public. (I understand settlement agreements are currently confidential.) Adding enforceable undertakings might cause, for consistency, such being added to Part 3 merger investigation settlements. I believe C&D can have a useful role as an optional and specialist mechanism to court proceedings but may require some fine tuning to bring this about. 40. No further comment. 41. I think all the options tabled should be canvased in the Issues Paper. 42. No further comment. 43. I do not think adding arbitration as another enforcement mechanism needs to be included in the Issues Paper. 44. I believe the principles set out in section 3.4 are also adequate for the Options Paper
Market Studies	
4.5 Is there a gap?	45. If there is a gap, I do not it is large as there are other means to have market studies undertaken as the IP identifies. The real issue seems to be whether the Commission, with its analytical expertise and industry information to draw on, would do a better job and more efficiently than other institutions in the study of competition? Very likely. 46. (a) I think the Commission is suited to perform this role and its analysis would provide consistency with the administration of trade practices and mergers under the Act. The role should not be exclusively with the Commission as the government might want a 'second opinion' or a study where the Commission's views are likely to be known. (b) Either by the Minister or on the Commission's own initiative. (c) I do not think mandatory information gathering powers are required (most businesses voluntarily cooperate) or desirable. If the Commission believes a breach of Act may be occurring which is why information is being withheld, it can use its s.98 powers. (d) As they will only be recommendations to the Minister, I do not see a need to limit the nature of them. (e) The Minister should communicate his or her decision once it is made.