ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION

SUBMISSION TO THE NEW ZEALAND MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT

1 Introduction and purpose of submission

1.1 The IBA

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at www.ibanet.org

1.2 Purpose of Submission

The International Bar Association's Antitrust Committee Working Group (***Working Group***) sets out below its submission on the Targeted Review of the Commerce Act 1986 (the ***Review***) issued by the New Zealand Ministry of Business, Innovation and Employment (the ***MBIE***) in November 2015. The issues raised in the Review are also being considered by a number of antitrust authorities and government departments around the world, including in Australia with the release of the Harper Review in 2015 and the Australian Government's ongoing Options to Strengthen the Misuse of Market Power Law Consultation (the ***Australian Consultation***). Accordingly, the Working Group welcomes the opportunity to comment on a number of aspects of the Review in New Zealand. The Working Group is conscious of the multitude of issues raised in the Review and wishes to address only certain issues based on the Working Group's international and New Zealand experience in a manner that the MBIE will hopefully find constructive and helpful.

2 Further review useful

Given the varying views on the workability of the law in New Zealand and the simultaneous review of similar issues by antitrust agencies and government departments around the world (in particular in Australia), the Working Group considers that further consideration of the New Zealand provisions outlined in the Review is relevant and timely.

In this respect, the Working Group also recommends that, given the similarities that exist between New Zealand and Australian competition law and policy and the ongoing desire for harmonisation between these two jurisdictions, any review of New Zealand antitrust law occur having regard to the outcome of the Australian Consultation. If changes to the current antitrust regime in New Zealand are proposed it would seem desirable for them to take into consideration any Australian proposals to ensure regulatory certainty and trans-Tasman business efficiency.

At the outset, the Working Group broadly agrees with the guiding principles set out by the MBIE as a means for determining the effectiveness of the current regime and any proposed amendments. These principles relevantly include:

- the long-term benefit of consumers (we assume that the long-term benefit of consumers in this case would include ensuring effective competition in markets and the protection of 'competition' rather than individual competitors);
- simplicity in interpretation and compliance (while at the same time ensuring clarity so as to aid enforcement);
- alignment with other provisions in the Commerce Act and equivalent prohibitions in overseas jurisdictions (having regard to the specific dynamics of the local economy when determining local enforcement priorities).

The following sections set out the Working Group's views in relation to the key issues raised by the Review and some international examples that may provide helpful guidance.

3 Misuse of Market Power

Summary: Further consideration of the effectiveness of s36 of the Commerce Act would be useful. The 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. If s36 is amended, it would be important that some filter, such as the 'take advantage' limb, exists so as to appropriately differentiate between anticompetitive conduct and aggressive procompetitive conduct on the part of firms with substantial market power.

As currently drafted, s36 of the New Zealand Commerce Act prohibits persons with a substantial degree of market power from taking advantage of that market power for a proscribed anticompetitive purpose.[1]

If this prohibition is to be the subject of reform, the Working Group considers that prohibitions on misuse of market power should focus on conduct with a material anti-competitive effect which does or would adversely affect competition and the competitive process, rather than simply focusing on the purpose/aim or form of the conduct. The Working Group considers that conduct should only be prohibited if it is actually and objectively capable of appreciably affecting competition, because this can normally be expected to reduce consumer welfare.

3.1 Purpose versus effect

In different jurisdictions around the world, prohibitions against the ‘misuse of market power’ or the ‘abuse of dominance’ tend to focus on either the purpose or the effect of the impugned conduct. Australia and New Zealand focus on the purpose of the firm with market power in engaging in the relevant conduct whereas the EU and US have a slightly different approach, analysing whether or not the relevant conduct in question had or may have had an anti-competitive effect. However, while this broad distinction is helpful it is also an oversimplification of the process undertaken by antitrust agencies and the courts in those jurisdictions which adopt such an approach, because

[1] Section 36 Commerce Act 1986 (NZ).

often an analysis of both effect and purpose/intent is undertaken, with purpose informing the effect analysis. In addition, in the EU, for example, certain types of conduct are presumed to infringe, without proof of anti-competitive effects (notably exclusivity clauses, rebates conditional on exclusivity, and so-called 'naked restraints').

The Working Group sets out below a brief overview of the state of the law concerning a misuse of market power so as to provide the MBIE with illustrative international examples.

(i) United States

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization. Under current law both offences require proof that the monopolist's acts had an anticompetitive effect sufficient either to obtain or maintain monopoly power. A finding of monopolization thus requires both the possession of monopoly power and the wilful acquisition or maintenance of that power through improper means, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[2] The mere 'exploitation' of lawfully obtained monopoly power -- such as by charging high prices -- is not a violation absent predatory or exclusionary conduct that harms the competitive process.

In the United States 'unlawful monopolisation' cannot be established without an analysis of both the effect and the proposed justification for the impugned conduct. Under US law it is well established that the offence of unlawful monopolisation requires something more than mere proof of monopoly power. General intent to harm a competitor or obtain a dominant position is not enough to satisfy the wilfulness element absent predatory or anticompetitive conduct. Where a firm has a legitimate business purpose, wilfulness cannot be established. For example, conduct where a defendant merely desires to increase its profits or market share can be distinguished from conduct where the defendant is willing to absorb losses to drive its competitors from the market. In *U.S. v Microsoft Corp*[3] the court identified the following principles for analysing a monopolist's conduct:

- to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect'. That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice;
- the plaintiff must demonstrate that the monopolist's conduct has that alleged anticompetitive effect;
- if a plaintiff establishes a prima facie case of an anticompetitive effect, then the monopolist may proffer a 'pro-competitive justification' for its conduct. If the monopolist asserts a pro-competitive justification then the burden shifts back to the plaintiff to rebut this claim;
- if the monopolist's pro-competitive justification is unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the pro-competitive effect;
- in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary, the court's focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the

[2] United States v. Grinnelll Corp., 384 U.S. 563, 570-71 (1966).

[3] 253 F.3d 34 (D.C. Cir. 2001).

conduct of a monopolist is relevant only to the extent that it helps the court understand the likely effect of the monopolist's conduct.

An application of the above factors means that unlawful monopolisation cannot be established without an analysis of both the effect and the proposed justification for the impugned conduct, having regard to the 'wilfulness' of the defendant's conduct in each case. Further, requiring plaintiffs to make an initial showing of harm helps to screen out non-meritorious cases, while requiring defendants to provide a non-pretextual justification enables a court to condemn patently anticompetitive conduct without having to engage in a complex balancing exercise.

The US antitrust authorities and courts have also considered a variety of other legal tests to help differentiate between economically efficient conduct and anticompetitive conduct, including the 'no economic sense' test,[4] 'profit sacrifice' test[5] and 'less efficient competitor' test,[6] each of which has strengths and weaknesses. However, the Working Group notes that none of these have been approved by the US Supreme Court or accepted in full by the US antitrust authorities.[7]

(ii) European Union

In Europe, there has been significant debate as to how the EU law on the misuse of market power – prohibition on abuse of dominance – contained within Article 102 of the Treaty on the Functioning of the European Union should be dealt with and this issue remains controversial.

Historically, there was concern that the Article was applied in an overly formalistic manner which could end up protecting particular (possibly inefficient) competitors rather than the competitive process. However, in recent years, the approach of the European Commission (***EC***) and (to a slightly lesser extent) the European courts has moved towards focusing on whether conduct of a dominant business has (or would have) adverse effects on competition, with a particular focus on exclusionary conduct that forecloses equally efficient competitors.

This approach is reflected in the publication by the EC of guidance on enforcement priorities when selecting cases to investigate under Article 102 TFEU.[8] When publishing its guidance the EC made it clear that its intention was to adopt 'an economic and effects-based approach to exclusionary conduct under Article 102 TFEU', that it is 'protecting competition and consumer welfare, not (individual) competitors who do not deliver to

[4] The US Department of Justice (***DOJ***) has advocated the use of a no economic sense test, which asks 'whether, on the basis of information available to a firm at the time of the challenged conduct, the challenged conduct would have made economic sense even if it did not reduce or eliminate competition. The test condemns conduct only when its anti-competitive objective is unambiguous because the conduct would not have been undertaken 'but for' the prospect of obtaining or maintaining monopoly power'. Although the DOJ has advanced this test in a number of cases, no court has yet adopted it.

[5] The profit sacrifice test is closely related to the 'no economic sense' test. One variant asks whether the defendant has sacrificed immediate profits as part of a strategy whose profitability depends on the recoupment of those profits through the exclusion of rivals.[5] Although it has not specifically adopted this test, the Supreme Court has raised this question in refusal to deal cases. Another variant asks 'whether the allegedly anti-competitive conduct would be profitable for the defendant and would make good business sense even if it did not exclude rivals and thereby create or preserve market power for the defendant'.

[6] Judge Richard A. Posner has proposed that an unreasonably exclusionary practice is one that is 'likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor'. Commentators and courts in the United States have found this test useful in evaluating bundled discounts or rebates.

[7] Antitrust Modernization Commission, Report and Recommendations, April 2007, p.93.

[8] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

consumers' and that 'dominant companies should be free to compete aggressively as long as this competition is ultimately for the benefit of consumers'.[9]

The European courts have, over time, also started to adopt a similar approach to that outlined in the EC's guidance, with more focus on the effect of the conduct in question and whether it produces any actual or likely exclusionary effect. This is particularly the case when it comes to price-based exclusionary abuses such as predatory or discriminatory pricing, where the impact and effect of the conduct is more easily established than the infringing firm's intent or purpose. However, the courts retain a more or less per se approach for certain types of conduct, notably exclusivity clauses, rebates conditional on exclusivity, and so-called 'naked restraints'.

There are distinct merits to an approach that considers the effect of anticompetitive conduct rather than just its purpose:

- it targets conduct which is likely to have a detrimental effect on consumer welfare;
- allows anticompetitive and pro-competitive conduct to be distinguished on the basis of specific facts; and
- reduces the risk of chilling otherwise pro-competitive behaviour.

However, there are also potential downsides, particularly in that an effects-based approach can reduce certainty for businesses as it generates a need for self-assessment of the relevant conduct.

(iii) Canada

In Canada, the relevant antitrust provision prohibits companies which 'substantially or completely control, throughout Canada or any area thereof, a class or species of business'[10] from undertaking an 'anti-competitive act'[11] where the effect of their conduct is to prevent or substantially lessen competition.[12] Section 79 of the Canadian Competition Act states:

> *Where, on application by the Commissioner, the Tribunal finds that*
>
> *(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,*
>
> *(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and*
>
> *(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,*
>
> *the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice*.

The inclusion of a requirement for an 'anti-competitive act' helps to provide a filter on the type of conduct that can be found to be a misuse of market power. The Canadian legislation then specifically outlines in a non-exhaustive manner what is meant by an

[9] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty (now Article 102 TFEU) to abusive exclusionary conduct by dominant undertakings (2009/C 45/02).

[10] Section 79(1)(a) of the Canadian Competition Act.

[11] Section 79(1)(b) of the Canadian Competition Act. Section 78 of the same Act lists a number of examples of 'anti-competitive act'.

[12] Section 79(1)(c) of the Canadian Competition Act.

'anti-competitive act'.[13] This 'filtering' mechanism has a similar intent to the 'take advantage' limb in the New Zealand legislation, which is meant to differentiate between anticompetitive conduct on the one hand and aggressive/vigorous competition on the other.[14]

Further, when considering whether conduct is anticompetitive, the courts in Canada also must consider whether it was done in furtherance of a legitimate business objective. This business justification is seen not as a defence but as part of assessing the overriding purpose of the conduct. The Federal Court of Appeal has said that 'a business justification must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts.'[15]

(iv) Singapore

In a similar fashion to Canada, the Singapore prohibition on abuse of a dominant position requires consideration of whether a dominant firm has used its dominant position in a way that amounts to an abuse.[16] The Singapore Competition Act outlines a range of conduct that may constitute an abuse of dominance.[17] In determining whether a firm has abused a

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[13] Anti-competitive acts are set out in s78 of the Canadian Competition Act and relevantly include:

> (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
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> (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
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> (c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
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> (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
>
> (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
>
> (f) buying up of products to prevent the erosion of existing price levels;
>
> (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
>
> (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
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> (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

[14] The Working Group notes that the New Zealand 'taking advantage' limb has been interpreted quite broadly by the courts, thereby reducing its effectiveness as an appropriate filter.

[15] *Canada (Commissioner of Competition) v Canada Pipe Co.* 2006 FCA 233 at [73].

[16] Section 47 of the Singapore Competition Act states:

> *(1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.*
>
> *(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —*
>
> *(a) predatory behaviour towards competitors;*
>
> *(b) limiting production, markets or technical development to the prejudice of consumers;*
>
> *(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or*
>
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.*

[17] Section 47(2) of the Singapore Competition Act.

dominant position, the Competition Commission Singapore (***CCS***) considers whether the dominant firm has used its dominant position in a way that amounts to an abuse.[18] In this regard, there must be a nexus between the market power considered and the conduct reviewed in order for the CCS to find an infringement under the Competition Act for an abuse of dominance.

(v) South Africa

In South Africa, the 'abuse of dominance' provisions of the Competition Act, 89 of 1998 comprise a list of specific conduct that fall to be proscribed as "exclusionary acts".[1] However, the mere existence of an “exclusionary act” does not mean that anti-competitive consequences are assumed to flow from that act. A showing of net harm to competition is still required.

In the *Competition Commission v South African Airways (Pty) Ltd*,[19] the Competition Tribunal clarified the approach to measuring 'anti-competitive effect' holding that the anti-competitive effect of exclusionary conduct may be proven by evidence of 'actual competitive harm' but also:

> *If there is evidence that the exclusionary practices, substantial or significant or expressed differently, have the potential to foreclose the market to competition. If it is substantial or significant, it may be inferred that it creates, enhances or preserves the market power of the dominant firm.*[20]

In rejecting the approach that the mere conduct should be deemed to have an anti-competitive effect, the Tribunal noted that 'the problem with this approach is that it can lead to the outlawing of conduct that has no anti-competitive effect'.

Although the South African assessment is clearly concerned ultimately with anti-competitive effects, the subjective purpose of the conduct can be brought to bear – both as evidence for and against a likely anti-competitive effect. In the *Bulb Man (SA) Pty Ltd v Hadeco (Pty) Ltd*[21] the Tribunal indicated that:

> *We can look at the anti-competitive effect from another perspective. Why is the dominant firm refusing to deal? As the authorities show, even dominant firms are entitled to refuse to deal. However, if the dominant firm lacked a proper explanation for its conduct, this might shift the probabilities in favour of the applicant.*

3.2 The take advantage limb

The Review also raises the issue of whether the take advantage limb of the prohibition in s36 should be repealed. While removing the ‘take advantage’ limb might appear to be effective in restricting behaviour by firms that would be economically damaging to other competitors, the Working Group considers that it may do so at too high a cost to the overall competitive process, possibly having a ‘chilling’ effect on competition.

[18] Publication of the Competition Commission Singapore, *CCS Guidelines on the Section 47 Prohibition*, June 2007.

[19] (18/CR/Mar01).

[20] *Competition Commission v South African Airways (Pty) Ltd* (18/CR/Mar01)..

[21] (81/IR/APR06).

An assessment of whether the conduct in question is linked to the firm's market power is an essential part of considering whether or not there has been an abuse of dominance (or 'taking advantage' of market power). The current ‘take advantage’ limb is intended to play an important filtering role to exclude otherwise pro-competitive conduct from the prohibition.[22] If this limb was removed, with no 'filter' inserted to replace it, the amended section s36 could ‘over-capture’ conduct that is otherwise pro-competitive and could prohibit economically beneficial behaviour.

As outlined above, in the United States, there is a requirement that the offence of unlawful monopolisation requires something more than mere proof of monopoly power. General intent to harm a competitor or obtain a dominant position is not enough to satisfy the 'wilfulness' element absent predatory or anticompetitive conduct. This 'wilfulness' element provides the relevant connection or nexus between the firm's monopoly power and the relevant anticompetitive conduct in question.

In Europe, while there is no explicit 'taking advantage' requirement in Article 102 of the TFEU, in practice most types of abuse are only possible for a dominant company (i.e. in the absence of dominance, below cost pricing or refusal to supply will not normally make sense commercially) so in this sense companies abusing a dominant position are generally using their 'dominance' to do so.[23] The position in Europe has been further clarified by case law which sees Article 102 imposing 'special responsibility' on dominant companies, so that, for example, exclusivity may be possible for both dominant and non-dominant firms, but dominant companies have to be more cautious in pursuing such an objective as their conduct may have anticompetitive effects that would not arise in relation to the same conduct on the part of a non-dominant company.

In other jurisdictions, such as Canada and Singapore, there are provisions which work in a similar way to the 'take advantage' limb by outlining the relevant anticompetitive conduct and ensuring that there is a link between the market power and the conduct in question.

In South Africa, the courts adopt the notion of 'leverage', which is akin to a requirement that the dominant firm be found to be taking advantage of its dominance in order to protect or enhance its market power, whether in that primary market or some related (vertical or collateral) market. Once again, the effects are key, but subjective purpose may provide an indication of a likely motivation based on a position of dominance rather than competition on the merits.

3.3 Substantial degree of market power

The Working Group considers that the issues outlined above in relation to the removal of the take advantage limb are exacerbated by the lower market power test currently adopted in the New Zealand (and Australian) legislation (which refers to a ‘substantial degree of market power’) rather than the higher ‘market dominance’ standard under EU law or the possession of ‘monopoly power’ under US law.

In this respect, amending the provision to refer to a corporation with ‘market dominance’ rather than a corporation with ‘substantial market power’ may warrant further consideration. Such an

[22] The Working Group notes that the New Zealand 'taking advantage' limb has been interpreted quite broadly by the courts, thereby reducing its effectiveness as an appropriate filter. In practice, it is often the case that if a corporation can find a suitable 'commercial' rationale for the relevant conduct, or the occurrence of similar conduct in other markets, this may operate as a defence.

[23] It is also worth noting that there are subtle nuances in the different national translations of Article 102 of the TFEU, some of which explicitly suggest that there needs to be 'exploitation' of the dominant position by the dominant firm. The Spanish version of Article 102 refers to 'abusive exploitation…of a dominant position'. The French version translates as 'to exploit, in an abusive way, a dominant position', and the Portuguese and Italian versions also have similar drafting. However, the European courts have generally found that 'exploitation' is not a necessary element with the focus being on an 'abuse' of a dominant position.

amendment would provide businesses with greater clarity regarding the applicability of the provisions and would ensure that only those businesses that have a very strong position in a particular market are subject to the prohibition. This reform would also bring New Zealand into line with other major antitrust jurisdictions such as the EU, US and UK.

In addition, certain jurisdictions, notably Germany, use market shares as a basis for establishing a presumption of dominance. Under German antitrust law there is a presumption that a single firm is dominant if it has a market share of 40% or more. Such market share thresholds are also used by the EC at the European-wide level, with the EC relevantly commenting:

> *Market shares are a useful first indication of the importance of each firm on the market in comparison to the others. The Commission's view is that the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance. If a company has a market share of less than 40%, it is unlikely to be dominant.*[24]

Developing guidance such as this may be helpful in the New Zealand context in determining whether a firm has a 'substantial degree of market power' and could also assist businesses in compliance as they would have a clearer benchmark from which to determine whether or not their conduct contravenes s36.

4 Alternative enforcement mechanisms

Summary: Jurisdictions around the world employ a variety of different alternative enforcement mechanisms. A brief summary of the regimes in Australia, the US, the EU, Singapore and South Africa is set out below. The Working Group thinks further consideration of the use of court enforceable undertakings, such as those in Australia, would be useful.

The Review raises the important issue of the high cost and delay associated with standard competition law enforcement processes. The two main alternative enforcement mechanisms currently operating in New Zealand are administrative settlements and the cease and desist regime. The Working Group sets out its comments below in relation to these two mechanisms and also provides, by way of illustrative example, mechanisms utilised in other jurisdictions.

4.1 Administrative settlements

The Working Group understands that the main form of alternative enforcement mechanism currently operating in New Zealand is the negotiated settlement. The New Zealand Commerce Commission (***NZCC***) has an implied authority to negotiate standard administrative settlements. However, unlike similar jurisdictions, New Zealand has no enforceable undertakings regime under the Commerce Act. The Working Group considers further assessment of the approaches adopted by other jurisdictions may be helpful.

[24] http://ec.europa.eu/competition/antitrust/procedures_102_en.html

(a) Australia

In Australia the *Australian Competition and Consumer Act 2010* (Cth) (***CCA***) specifically provides for a special type of negotiated settlement, known as an s87B Undertaking. Section 87B of the CCA gives the Australian Competition and Consumer Commission (***ACCC***) the ability to use court enforceable undertakings as a means to quickly and efficiently resolve competition concerns, in both the antitrust and merger contexts. Such undertakings cover both structural and behavioural remedies and are thus highly flexible and adaptable to the particular case at hand.

From the perspective of the party giving the undertaking, the ACCC does not always require that the corporation admits breaching the CCA since such an admission could result in third party claims by means of private enforcement and may be difficult without testing in a litigious forum. This makes the s87B undertakings process more attractive to those parties alleged to have breached the competition laws.

Indeed, the ACCC's own guidelines note that one of the key benefits of the s87B undertaking process is that it can be used to resolve competition concerns without costly and lengthy court processes. Undertakings also allow for efficient and often innovative outcomes.[25]

Relevantly, from the ACCC's perspective, breach of an s87B undertaking is actionable in court. If a breach of the undertaking is established the court may make orders providing for a quick and efficient resolution of any dispute.[26] This makes the s87B undertaking much more easily enforced than the administrative settlements currently operating in New Zealand.

The Working Group believes further consideration of the Australian enforceable undertakings regime and the implementation of a similar regime in New Zealand may be helpful.

(b) United States

In the US, the Federal Trade Commission can accept undertakings (called 'consent orders') in a procedure governed by the Federal Trade Commission Regulations, and the Department of Justice can accept undertakings (called 'consent decrees') under a procedure governed by the Tunney Act.

If the Federal Trade Commission believes that a company has violated the law or that a proposed merger will violate the law, the Federal Trade Commission may attempt to obtain compliance by entering into a consent order with the company. Similar to the regimes in Australia and Europe, a consent order can be made without the company admitting liability, however it must agree to stop the particular practice identified.

If the Department of Justice, after conducting an investigation, has good cause to believe that the antitrust laws have been broken, it may commence settlement discussions with a company. The Department of Justice and the company will reach an agreement subject to court approval. This agreement can be made without admission. A court must approve a consent decree if it is within the reaches of the public interest. While consent decrees must be approved by a court the court is not required to conduct an evidentiary hearing.

(c) European Union

The European Union has a similar regime under Article 9 of Council Regulation (EC) No. 1/2003 of 16 December 2002 where a company investigated under Article 101 (anti-competitive conduct) or 102 (abuse of a dominant position) of the TFEU may offer forward-looking voluntary 'commitments' (either behavioural or structural) in order to address the concerns outlined by the

[25] ACCC, 'Section 87B of the Trade Practices Act: Guidelines on the use of enforceable undertakings', September 2009.

[26] Section 87(4) of the CCA.

EC.[27] Following a period of public consultation on the precise terms of the undertaking, if it is considered adequate, the EC issues a decision making the commitments binding upon the company.

Indeed, the European regime, which is not dissimilar in effect to the Australian enforceable undertakings regime, has proven to be effective and has been used in a number of cases since its introduction. Ultimately, it is at the discretion of the EC to assess whether or not it is appropriate to accept commitments offered by parties under investigation.[28] The EC decision to accept commitments is based on a number of factors, and depends in particular on the nature of the suspected infringement, the nature of the commitments and their ability to quickly and effectively solve the competition concerns, and the need to ensure deterrence. When assessing the commitments offered, the Commission must verify in light of the principle of proportionality whether the commitments would be sufficient to address the identified competition concerns. It will also take into consideration the interests of third parties.[29]

Certain cases in particular may lend themselves to a commitment solution tackling the competition concerns effectively and quickly. Recently, EC commitment decisions have been adopted in a number of sectors, such as energy and financial services. They have also been used in the fast moving IT/Media markets, where speed is of the essence to effective competition enforcement.[30]

One of the key advantages of the commitments regime under Article 9 for the company in question is that it does not need to admit wrongdoing – there is no ultimate 'decision' or finding of infringement made by the EC. It also has the advantage for the EC that fewer resources are need to deal with the case. However, many believe that the very frequent use of commitments has been damaging in terms of reducing legal certainty (because this procedure does not result in a reasoned decision as to why specific conduct constituted an infringement) and also, perhaps, reducing deterrence.[31] For example, the use of commitments rather than infringement decisions may increase the difficulty of bringing follow-on damages claims in some circumstances.

In terms of enforceability, if a company does not comply with its commitments given to the EC, a fine of up to 10 per cent of the undertaking's annual turnover can be imposed without having to prove any violation of the competition rules. The EC can also impose periodic penalty payments of up to 5 per cent of the average daily turnover until the undertaking complies with its commitments. In parallel, the Commission may decide to re-open the investigation that was closed pursuant to the commitment decision, with a view to adopting a prohibition decision on the matter.

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[27] Commitment decisions are however not appropriate in cases where the EC considers that the very nature of the infringement calls for a fine. Consequently, the EC in particular does not apply the commitment procedure to secret cartels that fall under the Leniency Notice. Furthermore, in cases like hard-core cartels, there is no commitment possible to solve the competition problem. In such cases, an order to stop the practice and/or to pay a fine is the only appropriate outcome.

[28] http://europa.eu/rapid/press-release_MEMO-13-189_en.htm

[29] http://europa.eu/rapid/press-release_MEMO-13-189_en.htm

[30] See for instance Case AT.39847 – Ebooks.

[31] Another concern raised by some practitioners and commentators is that the settlements reflect what the parties are prepared to give in the light of the perceived merits of the case but later become embedded as a statement of what is permissible or not – which can be undesirable (for example, the divergent approaches by national competition authorities in the EU to the online hotel bookings cases).

4.2 Cease and desist regime

As outlined in the Review, the current New Zealand cease and desist regime has not proven to be as effective or as simple as originally hoped. Relevantly, the cease and desist regime:

- has only been used once in its 14 years of operation;
- is viewed by practitioners as being essentially the same as an interim injunction, without providing any streamlining in terms of cost-effectiveness or efficiency; and
- is considered to be less needed following changes to the High Court's Commercial List, the introduction of ex ante regulatory regimes in certain sectors, and the fact that the Commerce Commission no longer needs to make an undertaking as to damages when seeking an interim injunction.

Having regard to the above points, the Working Group thinks that further consideration as to the effectiveness of the current cease and desist regime in New Zealand is useful.

Relevantly, in Singapore, where the Competition Commission of Singapore (***CCS***) has reasonable grounds to suspect that the relevant prohibitions under the Singapore Competition Act (***SCA***) may be infringed, the CCS may give directions on interim measures if the CCS has not completed its investigations into the matter and the CCS considers it necessary to act urgently to protect the public interest or prevent serious, irreparable damage to particular persons.

Where an infringement has not been found or where investigations are ongoing, the CCS recognises that restricting firm behaviour may be unduly onerous. In this regard, the CCS will consider, among other things, whether there is a need to act as a matter of urgency and whether the directions are necessary to address the harm identified.

Where the CCS finds that there is an infringement under the SCA, the CCS may give such directions as it considers necessary to bring the infringement to an end. Such restrictions may be registered by the CCS in a District Court and the District Court shall have jurisdiction to enforce any registered directions.

5 Market Studies

Summary: There are a number of different market study regimes operating around the world. The effectiveness of these regimes has been mixed. Further consideration should be given as to the costs and benefits of altering the current New Zealand regime.

The Review notes the growing trend of market studies being undertaken by competition agencies around the world. In New Zealand, however, there is no formal power specifically allowing a relevant government department or antitrust agency to investigate any market from a competition perspective and make recommendations on how improvements can be made. The current regime allows different public bodies, such as the Commerce Commission, the Productivity Commission and the Electricity Authority to undertake research that may broadly be described as a 'market study'.

From an international perspective, there can be some benefits that flow from market studies where they result in positive changes to markets in circumstances where remedies might otherwise be unavailable or might take a significant amount of time to achieve through litigation. However, challenges can arise in circumstances where information gathered as part of a market study process is then used as a basis for enforcement activity. Concerns surrounding rights to due and fair process, the perceived and actual burdens to businesses in complying with mandatory and voluntary information requests and the time consuming and costly nature of the exercise may undermine the ultimate value of the market study.

Set out below are some examples from other jurisdictions on the use of market studies. As can be seen there is a wide spectrum of different options available although the experience in each of these jurisdictions has been mixed and there has been criticism that the process can outweigh the benefit of any remedies or information gathering achieved.

5.1 United Kingdom

The UK's antitrust regime provides for the most comprehensive market study powers of any comparable jurisdiction. The market study regime is unusual for a number of reasons as it grants autonomy to the Competition and Markets Authority (***CMA***) to both initiate and determine the focus of its own market studies (having regard to established criteria) and gain information via voluntary and mandatory information gathering powers. Once a market study is complete, the CMA may choose to make recommendations to government or business, may decide that no further action is required, or may make a reference so that a more comprehensive 'market investigation' is then undertaken by the CMA.

After the completion of a 'market investigation' and in circumstances where adverse effects on competition (***AECs***) are found, the CMA has a broad duty to implement remedies, 'having regard to the need to achieve as comprehensive a solution as is reasonable and practicable' to the AEC concerned and 'any detrimental effects on customers so far as resulting from the AEC'.[32] Where one or more AECs are found to exist, the UK regime grants the CMA extensive powers to accept binding undertakings from the relevant parties, propose one or more behavioural remedies (e.g. publication and consumer information requirements) and impose structural remedies by means of statutory order. Structural remedies may include, in relevant cases, requiring market participants to divest assets even though no unlawful or anti-competitive conduct by that particular firm has been made out.[33]

However, the CMA's conduct of market studies and market investigations is subject to a limited judicial review standard of oversight by the Competition Appeal Tribunal and the courts,[34] and there is limited parliamentary accountability for its individual decisions. Further, as the MBIE is aware, judicial review proceedings are generally available on a relatively small number of grounds and the CMA is also given a wide discretion as a fact finding body (known as its 'margin of appreciation') in such judicial review proceedings. Relevantly, there is no merits review available in relation to the CMA's findings.

[32] Section 138 of the Enterprise Act.

[33] Sections 154-167 and Schedule 8 of the Enterprise Act 2002 (UK).

[34] The Competition Appeal Tribunal hears judicial review (not merits) appeals in relation to the conduct of market studies and market investigations by the CMA. The CMA is afforded a broad margin of appreciation on its factual judgments as to whether there is an AEC.

The Working Group considers that given the powerful remedial aspect of market investigations in the UK, it is important that such a tool be used sparingly and be subject to appropriate judicial oversight. An incautious application of a market investigations regime such as this could negatively influence investors' decisions and ultimately reduce the supply of capital to the economy. In the UK, the legal framework does not require the CMA to take into account the possible negative long-run economic effects of its decisions, which is potentially problematic.

Overall, the Working Group considers that the UK experience has been mixed, with concerns expressed as to the time, cost and approach in recent market studies and whether the outcomes in some industries justify the intervention. Initial 'market studies' can take around 12 months in the UK (though often this is longer), and the more extensive 'market investigations' can take an additional 18-24 months, depending on the grant of extensions in particular circumstances. From a practical perspective, many participants have noted how burdensome and intrusive the data requests in relation to market studies and market investigations can be.

5.2 European Union

The European Union has specific 'sector inquiry' powers that permit a wide-ranging review of the nature and effectiveness of competition in a particular sector. However, as noted in the Review, these sector inquiry powers are used as a basis for determining where the EC's enforcement focus should be targeted – i.e. where Article 101 and 102 investigations should be made.[35]

The EC can also use its mandatory information gathering powers, including undertaking dawn raids, for the purpose of gathering information for its sector inquiries. A number of international commentators have said that it is concerning that in circumstances where there is no prima facie evidence of wrongdoing, such a use of mandatory information gathering powers can occur.[36] EU sector inquiries can also stretch over a number of years, with most taking between 18-24 months, although there is no fixed or statutory deadline.

In the EU significant concerns have been raised about these sector inquiry powers regarding due process and the protection of the rights of corporations and individuals. The extensive burden placed on businesses when having to comply with mandatory information requests or dawn raids may outweigh the benefits obtained from conducting the market study in the first place.

5.3 Singapore

The CCS has pro-active powers under s61A of the SCA to undertake market investigations where it has reasonable grounds for suspecting that a feature or combination of features in a market may prevent, restrict or distort competition. The powers to enforce compliance are also strict, with failure to comply with a request for information an offence under the SCA.

The CCS has, in practice, used this statutory power to conduct market studies in a number of industries. Where the CCS conducts such market studies, the results of the market studies are not necessarily made publicly available. The CCS may also conduct, or commission through

[35] European Commission, 'Submission to OECD Competition Committee on Market Studies' in Organisation for Economic Co-operation and Economic Development, *Policy Roundtables: Market Studies,* 2008, at p.154.

[36] See Helene Andersson and Elisabeth Legnerfalt 'Dawn Raids in Sector Inquiries – Fishing Expeditions in Disguise? European Competition Law Review, Issue 8, 2008.

third-party consultants, market studies without the use of its statutory powers under the SCA to compel market players to provide information.

The CCS's Policy & Markets Division was formed in 2014 specifically for internal advocacy and market monitoring, signalling an increasing emphasis by the CCS on the use of market studies. The CCS had stated that the Policy & Markets Division will employ market investigation tools, as well as other sector monitoring tools, to identify areas for attention. However, the CCS has not, in its on-going review of its existing guidelines, addressed specifically procedural safeguards or guidelines on the use of information obtained under its market studies.

5.4 South Africa

The South African Competition Commission has specific powers to undertake market enquiries under Chapter 4A of the South African Competition Act (***SACA***).[37] The market enquiries powers under Chapter 4A came into effect on 01 April 2013, so there have been relatively few enquiries to date. There are currently four ongoing enquiries into the banking, retail, healthcare and LPG sectors in South Africa.

Section 21 of the SACA requires the Competition Commission to, inter alia, 'implement measures to increase market transparency' and 'advise, and receive advice from, any regulatory authority'. In order to fulfil these functions, and in line with the purpose of the SACA, Chapter 4A now enables the Competition Commission to conduct market inquiries in respect of the 'general state of competition in a market for particular goods or services, without necessarily referring to the conduct or activities of any particular named firm'.[38] A market inquiry is thus a general investigation into the state, nature and form of competition in a market, rather than a narrow investigation of specific conduct by any particular firm.

The experience to date in South Africa has been limited given the recent introduction of the market enquiry powers. However, practitioners and businesses have already raised concerns regarding the burden of compliance and the length and time taken for the enquiry to conclude. Concerns have also been raised by many participants that these new powers are merely being used as a way to focus enforcement activity, in a similar manner to what occurs in Europe and there is also a risk that these market studies could become politically driven, or perceived as 'witch hunts' which either chills voluntary participation or leads to finger-pointing from those that do participate.

5.5 Australia

In Australia inquiries into markets have been conducted on an ad hoc basis by, for example, the ACCC,[39] the Productivity Commission[40] or state and territory regulators, but none of these bodies has a broad remit to conduct market studies.

[37] Chapter 4A of the South African Competition Act, No. 89 of 1998.

[38] Under section 43B (1)(i) of the SACA, the Commission may initiate a market inquiry if it has reason to believe that any feature or combination of features of a market for any goods and services prevents, distorts or restricts competition within the market.

[39] The ACCC currently has some limited scope to conduct market studies. Under section 28 of the CCA, the ACCC has functions in relation to dissemination of information, law reform and research although the information gathering powers set out in the CCA do not apply to this section. Under Part VIIA of the CCA, the Minister may require the ACCC or another body to hold a price inquiry.

Relevantly, the ACCC currently has the power, upon receiving written notice of the Minister, under s95H of the CCA, to conduct 'price inquiries' into specified matters, although inquiries are often of a broader nature than just price.[41] The ACCC is currently conducting a price inquiry into the competitiveness of wholesale gas prices and the structure of upstream, processing, transportation, storage and market segments of the gas industry. The ACCC has previously conducted inquiries in relation to the price of unleaded petrol and into the price of groceries.

The conduct of market studies in Australia is currently under review after the release of the Harper Review's Final Report and the Government's response.

5.6 Further considerations

Ultimately, the Working Group considers that if the MBIE undertakes a review of the benefit of market studies, three key factors should be borne in mind:

- sufficient safeguards must be implemented to ensure that due process is maintained and that market studies do not become a fishing exercise for enforcement activity;
- information gathering powers are appropriate and flexible having regard to the compliance burden faced by businesses; and
- the cost and duration of market studies must be limited to ensure that they occur in a timely, efficient and cost-effective manner.

Safeguards of this nature are necessary to reduce the risk of a heavy-handed use of any market study or market investigations regime. Using competition policy to punish and deter acquisition or abuse of market power through acquisitions or agreements is uncontroversial and appropriate. Using it to penalise market power attained through organic growth – investing to create a market, developing superior products or creating intellectual property through innovation – risks being anticompetitive itself and introducing business risk and uncertainty, or as some would argue sovereign risk in investing in some countries.

[40] The Productivity Commission has information-gathering powers in relation to its inquiries under section 48 of the *Productivity Commission Act 1998* (Cth) but generally chooses not to use them, relying instead on information voluntarily submitted by interested parties. That said, the ability of the Productivity Commission to draw upon these powers if required may act as an incentive for parties to provide information voluntarily.

[41] Under s95H of the CCA, in conducting a 'price inquiry' the ACCC:

- must give notice of the inquiry in each state and territory and to certain persons;
- may conduct public inquiries. The ACCC can receive evidence in a number of ways, including through:
- written submissions;
- oral evidence;
- written statements;
- evidence on summons;
- requiring mandatory documents and information;
- must complete the inquiry and deliver a report to the Minister within the time required by the written notice of the Minister.

6 Next steps

The Working Group considers that the MBIE's Review has raised important issues that are currently also being considered by a number of antitrust agencies and government departments around the world, in particular in Australia. Overall, the Working Group believes further consideration of the three main issues identified by the Review would be useful. Given that Trans-Tasman harmonisation is an important policy issue and focus in a time of increasing legal and economic integration of Australia and New Zealand, it would be useful to take into consideration the Australian approach in respect of the issues.