

9 February 2016

Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
Wellington

By email: commerceact@mbie.govt.nz

**SUBMISSION on
“Targeted Review of the Commerce Act 1986” Issues Paper**

1. Introduction

Thank you for the opportunity to make a submission on the Targeted Review of the Commerce Act 1986 Issues Paper. This submission is from Consumer NZ, **New Zealand’s** leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

Contact:

2. General comments and answers to questions in Issues Paper

Consumer NZ agrees further investigation of the matters within the scope of the Issues Paper is required.

We have provided responses to selected questions in sections 2 to 4 of the Issues Paper. Our responses relate primarily to section 36, the Commerce Commission’s enforcement powers and proposals for market studies.

Question 9 – Do you agree that section 36 may not effectively assure the long-term benefit of consumers? If you agree, are there any sectors of the economy where you consider this to be well illustrated? If you disagree, please explain why.

We agree section 36 of the Commerce Act does not effectively assure the long-term benefit of the consumers.

The supermarket sector is one example of an industry in which consumers would be likely to benefit from an amendment to section 36 of the Commerce Act. Our supermarket trade is one of the most concentrated in the world, with two big chains dominating the market. Concentration of this nature has inevitable risks for suppliers and consumers and has the potential to influence the price consumers pay for goods and services.

Question 11 – Do you agree that section 36 – as applied by the courts – is too complex to ensure that it is cost-effective and timely?

Yes, we agree section 36 is too complex to ensure it can be used in a cost-effective and timely manner.

Question 12 – Do you agree that section 36 – as applied by the courts – is not well aligned with other relevant provisions?

Yes, we agree section 36 is not well aligned with other relevant provisions.

Question 13 – Given your view on the correct implication of having a small and remote economy, do you consider that section 36 appropriately reflects that implication?

We do not think section 36 adequately recognises New Zealand's small and remote economy. In our view, the current drafting of section 36 does not give the Commerce Commission sufficient powers to intervene when powerful firms behave in an anti-competitive manner.

Consumer NZ believes competition law needs to recognise the unique characteristics of our market and allow regulators to respond effectively to situations where dominant firms may be taking advantage of their market power to the detriment of consumers.

Question 16 – Do you agree with the Ministry's conclusion? Please explain why.

Yes, we agree with the ministry's conclusion that the operation of section 36 has not been satisfactory. We also agree with the ministry's reasoning in the Issues Paper for its conclusions.

Question 18 – Which of the potential options identified would you like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would be worthy of consideration.

We would like to see a more in-depth analysis of the second (removing the taking advantage requirement), third (adding an effects test) and fourth (removing the taking advantage requirement and adding an effects test) options proposed by the ministry in the Issues Paper.

All options will need to take into account New Zealand's small size and remote economy and the over-arching principle of assuring the long term benefit of consumers.

Question 19 – Which of the potential options identified are not worthy of discussion if the Ministry publishes an options paper next year? Please explain why these options would not be worthy of consideration?

Given our agreement with the ministry's conclusion (see above), in our view, retaining the status quo is not a valid option.

Question 22 – Do you agree that standard enforcement of the Commerce Act (litigation by the Commerce Commission in the courts) faces high costs and long delays? Please give your reasons for your view.

Yes, we agree that standard enforcement of the Commerce Act faces high costs and long delays. Some cases have taken several years just to get to court, for example, the Telecom *0867* case¹, and the *Data Tails*² case.

Consumer NZ supports the development of further alternative enforcement mechanisms that are designed to resolve competition issues in a more efficient manner.

Question 27 – Do you agree that the current settlements regime has a number of weaknesses? Please give reasons for your answer.

Yes, we agree the current settlement regime has a number of weaknesses. We also agree with the reasoning of the ministry in the Issues Paper.

Question 39 – Do you agree with the Ministry’s conclusion? Please explain why.

Yes, we agree with the ministry’s conclusion that the alternative enforcement mechanism regime under the Commerce Act is not operating satisfactorily. We also agree with the reasoning behind these conclusions.

Question 41 – Which of the potential options identified would you like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would be worthy of consideration.

We do not agree that maintaining the status quo is a valid option so would like to see a more thorough analysis of option 2 (modifying the cease and desist regime) and option 4 (repealing the cease and desist regime and modifying the settlements regime). Given the cease and desist regime has been ineffective to date, in our view, option 3 (repealing the cease and desist regime) is much the same as maintaining the status quo.

Question 45 – Do the approaches to market studies described in the Issues paper align with a gap in New Zealand’s institutional setting for promoting competition?

Consumer NZ agrees with the views of the Productivity Commission on market studies.³ We would therefore support a new market studies power being granted to the Commerce Commission.

Competition authorities in many developed economies are now able to conduct market studies but the commission’s powers are more limited.

The ability of the commission to undertake independent investigations, without necessarily having to act on a complaint, would enhance its knowledge of business practices generally and of the marketplace. That must, in the long term, benefit consumers and businesses.

¹ *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2009] NZCA 338

² *Telecom Corporation of New Zealand Limited v Commerce Commission* [2012] NZCA 278

³ *Boosting Productivity in the Services Sector*, New Zealand Productivity Commission, May 2014, pp 140 - 151

Question 46 – If there is a gap, what procedural settings for a market studies power would best fit the gap, in terms of:

- a. The appropriate body to conduct market studies;**
- b. Who may initiate a market study;**
- c. Whether mandatory information-gathering powers should apply;**
- d. The nature of recommendations the market studies body could make;**
and
- e. Whether the government should be required to respond.**

In our view:

- a. the Commerce Commission would be the most appropriate body to conduct market studies in New Zealand. We do not think there is an issue with the Commerce Commission being both the regulator and market studies body;
- b. the Commerce Commission, Parliament and ministers should be able to initiate a market study;
- c. mandatory information-gathering powers should apply to enable the commission to gather enough information to effectively conduct market studies. We think the powers should be similar to those set out in section 20 of the Inquiries Act 2013;
- d. the Commerce Commission should be able to make recommendations consistent with achieving the purpose of the Commerce Act. Consideration should also be given to the UK model where the Competition and Markets Authority has a duty to implement remedies when it finds an adverse effect on competition; and
- e. where a response is relevant, legislative reform is required, or the commission has made a recommendation which requires a response, the government should be required to respond.

Thank you for the opportunity to make a submission on the Issues Paper. If you require any further information, please do not hesitate to contact me.

Yours sincerely