

21 July 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

To whom it may concern,

TARGETED REVIEW OF THE COMMERCE ACT

1. Retail NZ is a trade association whose members account for around two-thirds of total retail spending. Our membership is extremely diverse: it includes major corporates, as well as a large number of very small firms - and everything in between.
2. Retail NZ has now had the opportunity to review the 39 submissions made on the Targeted Commerce Act and the letter from the Commerce Commission to the Minister of Commerce and Consumer Affairs.
3. We are writing as we wish to reiterate our view that the Commerce Act is currently working well. It promotes its fundamental purpose of encouraging market competition for the best long term benefit of New Zealand consumers, and we therefore disagree that reform is needed to achieve this goal.
4. Within New Zealand's retail sector, consumers are benefiting from high levels of competition, which result in lower prices for consumers. The Issues Paper suggests that powerful firms should have stricter rules imposed on them than firms abroad, as New Zealand's remote economy has higher entry barriers, making markets weaker to self-correction. As can be evidenced by the number of international retailers that have recently established a presence in New Zealand, there are currently no barriers to new entrants to the retail market. Consequently consumers have a much greater range of choices, which is a powerful driver of competition.
5. Should New Zealand be seen as a country where the largest industry players were subjects to stricter, less certain and more onerous regulations than anywhere else, this would be detrimental to our country's ability to attract businesses.
6. New Zealand is a relatively small market and needs companies with size and scale to be able to compete globally. Should the proposed change to Section 36 go ahead, it would be significantly more challenging for companies with market power to compete internationally.

Anti-competitive exclusionary conduct (Section 36)

7. The natural outcome of fair competition is that some business ventures will be unsuccessful, while others thrive and grow.
8. The current counterfactual test promotes competition, and to argue that a safe harbour is created for certain conduct is incorrect. Market power encourages innovation, drives efficiency and improves services and products, which is to the benefit of customers. In a competitive marketplace some firms will fail and others will succeed. The law should not seek to punish those who achieve success in a competitive marketplace just because they are large in size. Businesses should not be penalized or be subject to special rules/responsibilities just because they have achieved size and scale as a result of their success in the market place.
9. A change to the Commerce Act that creates uncertainty and which risks inhibiting innovation and chilling competitive behavior is at odds with the Purpose of the Act; to promote the best long term benefits of consumers.

RETAIL NZ // HQ

Level 6, 56 Victoria Street, Wellington 6011
PO Box 12086, Thorndon, Wellington 6144

P // 0800 472 472

E // info@retail.kiwi

W // retail.kiwi

Connect with us:



Formerly known as:

The New Zealand Retailers
Association Incorporated

10. In our view, the current Section 36 achieves its purpose, preventing anti-competitive abuse of market power.

‘Purpose’ vs ‘Effects’ Test

11. Retail NZ is strongly supportive of retaining the ‘purpose test’ and the causal link between a firm’s substantial market position and the action taken. The current law is well understood by the business community who have 20 years of case law on which to rely and draw guidance.
12. Our organization strongly opposes changing this test to an ‘effects test’, which prohibits conduct that has the effect of being exclusionary, regardless of intent or whether there is any connection with a firm’s market power.
13. An ‘effects test’ would require businesses to conduct their actions based on assumptions and detailed analysis about future scenarios. This in itself would increase costs for businesses and encourage more conservative decision making. As some implications would be outside the control of the business, the overall result would be a chilling of innovation and a stifling of risk taking.

No case has been made for change

14. In its current form, Section 36 lends a degree of certainty to business decisions with regard to whether or not such decisions will breach the law. We do not see that there is an issue with the current wording which warrants change.
15. We do not agree that the relatively small number of court decisions around Section 36 is indicative for the need for change. On the contrary, we see that the current law is preventing and deterring anti-competitive behaviour, having the result that businesses, for the most part, are able to deal in a way which avoids breaching the law.

The impact of introducing an ‘effects test’

16. An ‘effects test’ would have a negative effect on competition as it would risk stifling innovation, as a business would need to speculate in the abstract likely effects of its conduct on competitors and the market.
17. This would significantly increase the administrative and financial operations for businesses in their day to day decision making. Both large and small businesses (who may have market power in niche markets) may find it difficult to make quick and appropriate decisions faced with the additional burden of market analysis and special responsibility for the competitive state of the market in which they operate.
18. The proposed changes to Section 36 would create legal uncertainty within business investment and strategy. Knowing that a miscalculation as to projected effects could lead to charges, risk taking would decrease and businesses would become more conservative. This may lead to the stagnation of competition as a whole and the goal of enhanced efficiency would be at risk.
19. With the increase in international trade, it is critical that New Zealand businesses maintain and increase business and investment activity.
20. Ultimately, the combination of all of these factors may potentially harmful to the best long term benefit of New Zealand consumers.
21. An effects test may see a rise in 'borderline' cases brought before the Court to test the boundaries of the new section. This would both clog the court system and increase the costs that businesses may have to face. As is normal practice in business, costs are almost always passed on to the consumer.
22. This too, is another illustration of where the knock-on effect of an ‘effects test’ might not be of the best long term benefit to consumers.

Legislative alignment

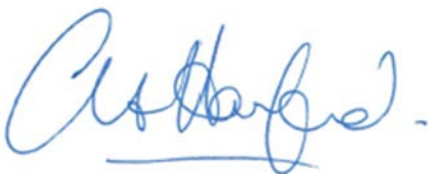
23. In principle, Retail NZ supports the alignment of legislation with Australia (and legislation around the world). However, we assert the need for a clear economic benefit for New Zealand to do so. A wait and see approach [to Australian legislative changes] should be adopted, so that decisions can be made with clearer understanding as to the trans-Tasman implications.
24. Adopting any Australian approach must not be done *carte blanche*, for sake of harmonisation. Due consideration as to the implications must be weighted.
25. Further, concerns about the misalignment between New Zealand and other provisions, such as the EU, should bear in mind the peculiarities of each legal system. European law generally favors regulatory intervention, which is not a cornerstone of the legal and regulatory system in New Zealand.

Market studies

26. Market review processes are expensive, time consuming and distracting for business; these costs ultimately will be passed onto consumers.
27. There is a risk that market reviews may produce policy gains from marginal benefits, yet these gains may be outweighed by the costs associated.
28. The Commerce Commission already has investigatory powers under Section 27 of the Act, and MBIE is already able to undertake policy work in respect of particular markets. Given that there are already existing powers, it seems unnecessary to add further specific powers to undertake market studies. In the interest of conflict limitation, should the review recommend an agency be tasked with undertaking market studies, it should sit outside of the Commerce Commission.
29. It is not clear that tasking a government agency with specific powers to undertake market studies will lead to improved outcomes for consumers. Again, the case for change is not clear.

Thank you for the opportunity to cross-submit on this issue.

Yours faithfully,



Greg Harford
General Manager, Public Affairs
Retail NZ