## Submission template: Review of section 36 of the Commerce Act and other matters

### Your details

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| **Name** |  |
| **Email** |  |
| **Organisation** |  |

### Use and release of information

[ ]  The *Privacy Act 1993* applies to submissions. Please check the box if you do not wish your name or other personal information to be included in any information about submissions that MBIE may publish.

[ ]  MBIE intends to upload submissions received to MBIE’s website at [www.mbie.govt.nz](http://www.mbie.govt.nz). If you do not want your submission to be placed on our website, please check the box.

*For more detail on how MBIE proposes to release submissions, please see page 3 of the discussion paper.*

[ ]  I would like my submission (or specified parts of my submission) to be kept confidential, and attach my reasons and grounds under the *Official Information Act 1982* that I believe apply, for consideration by MBIE.

### Responses to discussion paper questions

Your submission may respond to any or all of the questions from the discussion paper. There is an additional box at the end for any other comments you may wish to make. *Text boxes will expand as you complete them.*

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| **Decision-making criteria** |
|  | Do you agree with the primary objective and the criteria? |
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| **Section 36: Problem Definition** |
|  | Can you offer any new evidence on the costs and benefits of section 36, as currently worded? If you have previously submitted on this issue, do you have anything new or different to add to your views on the effectiveness of section 36? If you have not previously submitted on this issue, what are your views on the effectiveness of section 36? |
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| **Section 36: Designing a Unilateral Conduct Prohibition** |
|  | Do you agree that interconnected bodies corporate should be treated the same as a single firm? |
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|  | Do you agree that “a substantial degree of power in a market” is an appropriate threshold for the prohibition? |
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|  | Do you agree that a new prohibition does not require any equivalents to the Australian section 46(4)-(7)? |
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|  | Should a new prohibition define the types of proscribed conduct? Should a new prohibition describe or list the types of proscribed conduct? |
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|  | Should the prohibition focus on purpose OR effects, purpose AND effects, solely purpose, or solely effects? Please provide reasoning. |
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|  | Should purpose be defined as per the existing case law or should it explicitly be an objective purpose? Should section 36B and/or an equivalent provision be retained? |
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|  | Is a “substantial lessening of competition” the appropriate standard for the prohibition? If not, do you have any alternative suggestions? Does the SLC standard provide enough certainty to assess conduct before it is undertaken? |
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|  | Can you provide any examples of exclusionary conduct where the anti-competitive effects and the pro-competitive effects occur in different markets? Should the prohibition enable a balancing of pro- and anti-competitive effects that occur in different markets? |
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|  | Should a “less restrictive alternative” test form part of the analysis when assessing conduct with both pro- and anti-competitive effects? |
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| **Section 36: Providing certainty** |
|  | Are there any forms of anti-competitive unilateral conduct that should be specifically prohibited in the Commerce Act? |
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|  | Should the Act provide for secondary legislation to provide greater certainty for anti-competitive unilateral conduct? If so, who should hold the power to make secondary legislation? |
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|  | Should authorisation be available for unilateral conduct? |
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| **Section 36A: Misuse of Trans-Tasman Market Power** |
|  | In your view, does section 36A have any practical effect? Should section 36A be retained or repealed? If section 36 is changed, should section 36A be changed to mirror the new section 36? |
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| **Section 36: Options Identification and Impact Analysis** |
|  | Do you support our initial proposition? If not, why not?  |
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|  | Do you agree with the rejection of these options as unfeasible? Are there any other options that should be considered? |
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|  | Do you agree with our assessment of this option against the criteria? If not, why not? Please provide evidence to support your answers. |
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|  | Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer. |
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| **Treatment of Intellectual Property in the Commerce Act** |
|  | Can you identify any examples of potentially anti-competitive IP-related conduct that is likely to fall within the scope of the Commerce Act’s IP-related provisions at present?  |
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|  | Do you agree with our initial assessment that there is not a strong rationale for treating IP-related conduct differently to other forms of conduct? If not, why not? |
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|  | Do you agree with the specific issues with the IP provisions that we have identified? If not, why not? Are there other specific issues with the provisions that we have not identified? |
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|  | Are there other options that we should consider? For example, are there modifications that could be made to one or more of the provisions to clarify or reduce their scope? |
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|  | Do you agree with our assessment of this option against the criteria? If not, why not? |
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|  | Do you support our initial preferred option? If not, why not?  |
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|  | Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer. |
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| **Covenants**  |
|  | Do you agree that covenants and provisions of contracts should be treated the same in the Commerce Act? If not, why not? |
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|  | Are there other options that we should consider?  |
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|  | Do you agree with our assessment of these options against the criteria? If not, why not? |
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|  | Do you support our initial preferred option? If not, why not?  |
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|  | Do you agree with the types of costs and benefits identified? Do you agree with the valuation of the costs and benefits? If not, why not? Please provide evidence to support your answer. |
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