BUDDLE FINDLAY
NEW ZEALAND LAWYERS

1 APRIL 2019

Review of Section 36 of the Commerce Act and other matters.

Submission from Buddle Findlay

1. This submission is from Buddle Findlay's competition team. Buddle Findlay is one of New Zealand's leading commercial and public law firms with offices in Auckland, Wellington, and Christchurch.

2. Buddle Findlay has particular expertise in competition law. Our competition law team provides strategic advice on competition aspects of local and international clients' business operations. We advise on restrictive trade practices, clearance and authorisation applications to the Commerce Commission, Commerce Commission investigations, and industry sector issues under the Commerce Act 1986 (**Act**).

3. We are making this submission on our own behalf, and not on behalf of any client.

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5. This submission does not contain any confidential information.

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INTRODUCTION

1. Thank you for the opportunity to make a submission on the issues outlined in the Ministry of Business, Innovation, and Employment's Discussion Paper: Review of Section 36 of the Commerce Act and other matters (**Discussion Paper**).

2. The Discussion Paper notes that in previous reviews of section 36, law firms representing large businesses have generally supported retaining the current test contained in section 36 of the Act. However, for every law firm advising a firm with a substantial degree of market power on the application of section 36, there is often another law firm advising firms affected by the alleged abuse of market power. In fact, a significant proportion of our work relating to section 36 in recent years has been for firms affected by such conduct. Buddle Findlay's submission is based upon our experience and expertise in this area of law.

3. We will firstly outline our key submissions, and then address the specific questions in the Discussion Paper.

SUMMARY OF SUBMISSION

4. We submit that the Discussion Paper does not adequately define the problem with the current formulation of section 36. This makes it difficult to properly assess the costs and benefits of the proposed solution relative to the status quo.

5. It is not clear that there is a problem with the current formulation of section 36. If there is a problem with section 36, it is important that any solution proposed does not impose greater costs on the economy than the current formulation of section 36.

6. If the problem with the current formulation of section 36 is that it produces false negatives, it is likely that any proposed solution will not be perfect, and would therefore produce false positives. To a certain degree, that needs to be accepted, and can be accommodated through an authorisation regime. However, as explained later in this submission, we consider that the Discussion Paper's proposed solution is likely to produce false positives to such an extent that it will impose costs on the economy that are out of proportion to the problem identified. The proposed authorisation regime would not provide an answer to those concerns.

7. We therefore have significant concerns that the proposed solution

will not improve on the status quo.

8. To address those concerns, we submit that, if section 36 is amended, the proposed test is altered so that it incorporates an assessment of whether the relevant conduct is for an exclusionary purpose. That test could be along the following lines:

> "*A person that has a substantial degree of power in a market must not engage in conduct that—*
>
> *(a) is for an exclusionary purpose; and*
>
> *(b) has, or is likely to have, the effect of substantially lessening competition in a market."*

GENERAL COMMENTS ON PROBLEM DEFINITION AND PROPOSED SOLUTION

Discussion Paper does not clearly identify the problem, so the costs and benefits of possible solutions relative to the status quo cannot be properly assessed

9. As a preliminary issue, the Discussion Paper does not clearly identify, or provide evidence of, the problem with the current section 36. We acknowledge that the Discussion Paper invites submissions on the extent to which there may be problems with the current formulation of section 36, and asks for evidence of those problems. However, it also attempts to propose options for possible solutions to any perceived problems at the same time.

10. The absence of a clear problem definition makes it difficult to assess the costs and benefits of each option the Discussion Paper proposes, relative to the status quo. Any proposed means to address a problem with the current formulation of section 36 must offer an improvement on the status quo. In other words, the net effect of any change to section 36 must not be to impose additional costs (including through efficiency losses) on the economy.

We have assumed that the main problem the Discussion Paper is trying to address is a problem of false negatives

11. We have assumed that the main problem that the Discussion Paper seeks to address is based on the claim that the current section 36 produces wrong answers in the form of false negatives, and fails to deter some types of conduct. However there does not yet appear to be examples or evidence of section 36 producing false negatives.

If that is the problem, amending section 36 in the way proposed will produce costs that outweigh any benefits

12. We acknowledge that taking steps to address a problem of false negatives would require the scope of section 36 to be broadened. As it is unlikely that there could ever be a perfect formulation of section 36 that captures only undesirable conduct by firms with a substantial degree of market power, broadening the scope of section 36 is likely to produce some false positives. To a certain degree, this may be an acceptable outcome, and some false

positives could be dealt with through an authorisation regime.

13. However, for that to be the case, the benefit to the economy of an option that would prohibit conduct currently characterised as false negatives must outweigh the costs that the option may impose on the economy. Those include the costs associated with producing false positives, or deterring economically beneficial conduct as the result of a perception that such conduct is prohibited.

14. We are concerned that the test the Discussion Paper proposes will produce false positives of such a magnitude that the proposed test will impose costs on the economy which far outweigh any benefits of minimising the potential for the types of false negatives that may be produced under the status quo. We provide examples of false positives to illustrate our concern with the proposed test from paragraph 16 below.

The additional problem identified of high enforcement costs is unlikely to be one that can be resolved

15. The Discussion Paper also refers to the problem of high enforcement costs, and the cost of enforcement as a criterion for assessing potential solutions. We do not believe that this is a problem that can be solved by broadening the ambit of section 36. Section 36 is directed at firms with a substantial degree of market power. Such firms will usually be well-resourced. As a result, they are likely to have the ability to invest in contesting challenges under section 36 where they have made a conscious choice to engage in the relevant conduct, which will naturally make enforcement of the provision expensive. This dynamic will remain irrespective of the scope of section 36.

Costs of the proposed solution: false positives

16. As stated above, we are concerned that the Discussion Paper's proposed test would produce an excessive level of false positives. To illustrate that concern, we set out two examples:

    (a) steps taken by public funders of services to improve the efficiency and quality of services within the constraints of their allocated appropriations; and

    (b) innovation by firms with a substantial degree of market power, which may have a drastic effect on price.

False positive 1: Public funders of services

17. Many essential services, and some goods (such as pharmaceuticals), are commonly purchased by a public funder from private providers for consumption or use by the public. Examples of such services include health, public transport, and

waste services.

18. The public funders of such goods and services must operate within the appropriations they have been allocated, which gives rise to budget constraints. They also generally operate with the objective of distributing their limited pools of funding in a way that best meets the Government's policy objectives, and the needs of the New Zealand public. Factors relevant to those objectives include the needs of local communities, whether the goods or services provided are of the right type to address those needs, and the sustainability of the services provided.

Public funders' budget constraints and policy objectives often lead them to decisions that may lessen competition

19. In that context, public funders of goods and services are often faced with questions such as whether they should limit the number of private providers with whom they contract; what level of funding they should make available to an individual provider; and whether or not they should contract with an individual provider at all.

20. We are aware that private providers who are at risk of losing funding or not receiving a contract often try to use section 36 to claim that they are entitled to funding. A common argument is that, if a provider does not receive funding or a contract, that will adversely affect competition, and the public funders will be in breach of section 36.[1]

The purpose element of the current test protects such conduct from claims under section 36

21. Under the current section 36, the courts have rejected that argument. Their reasoning, exemplified in *New Zealand Private Hospitals Association & Auckland Branch Inc v Northern RHA* HC Auckland CP440/94, 7 December 1994, relies on the purpose element of section 36. In that decision:

> "*A sole purchaser of long-stay beds in private hospitals in one region in New Zealand was accused by the Private Hospitals Association of taking advantage of its market power to reduce the number of providers of long-stay beds. The Court ruled that no anti-competitive purpose was apparent, although it acknowledged that the effect of the behaviour was likely to be a reduction in competition. However, it noted that the purchasing organisation had a budgetary limit for spending, and wished to spend that budget in the most cost effective way*" (from the Commerce

[1] Sections 5 and 6 of the Act provide that the Act applies to the Crown to the extent that it engages in trade, and to every body corporate that is an instrument of the Crown engaged in trade. Applying *Re New Zealand Medical Association* (1988) 7 NZAR 407 and *Glaxo v Attorney-General* [1991] 3 NZLR 129, high-level policy decisions by public funders are unlikely to be in trade, and therefore would not be subject to the Act. However, more granular decisions relating to the purchase of goods or services are likely to be decisions made "in trade", and subject to the Act.

Commission's *Powerful Purchasers* fact sheet).

22. This approach is reiterated in the *Powerful Purchasers* fact sheet:

> "*…in most cases powerful purchasers in the health sector will not be aiming to harm competition. They will usually be trying to put downward pressure on prices both in the short and longer terms to try to get the best value for tax payers' money. While the result of the steps they take to achieve this may be that some providers lose their funding and exit the market, this is not illegal under the Commerce Act.*"

That protection would be lost under the Discussion Paper's proposed test

23. If the preferred approach in the Discussion Paper is adopted, public funders' lack of an anti-competitive purpose when allocating funding to private providers would be irrelevant.

There is no clear line of reasoning to protect public funders under proposed test

24. We presume it is not intended that conduct by public funders to ensure the efficient use of public funds is caught by section 36. However, assuming that a public funder has a substantial degree of market power, we have not been able to identify a clear line of reasoning under the proposed new section 36 that would allow a public funder to distribute funding in a manner that is consistent with its objectives, but also happens to be likely to substantially lessen competition. That would suggest that such conduct would be prohibited, unless authorised under the proposed new authorisation regime.

False positive 2: Innovation by firms with a substantial degree of market power

The proposed new section 36 would disincentivise innovation by dominant firms

25. Our second example of a false positive is hypothetical. It relates to a scenario in which a firm with a substantial degree of market power identifies a new way to produce a product or service that would substantially cut costs. If the likely effect of developing that product or service would be to put most of the firm's competitors out of business, it appears that pursuing that innovation could breach the proposed new section 36.

Reduced innovation may prevent consumers from benefiting from lower prices

26. As an example of how the proposed new section 36 could prevent or deter innovation, a firm with a substantial degree of power in the market for dairy processing could theoretically identify a way to process grass directly into milk, removing cows from the production chain, drastically reducing the cost of production. This would enable the firm to sell milk products at a fraction of the prevailing price. That new price could be below its competitors' cost of production. If the firm reduces its price to that level, that would likely drive its competitors out of business, and, consequently, substantially lessen the level of competition in the

market.

27. There may be an argument that such an outcome would be the result of the process of competition, and potentially have a net pro-competitive effect. However, on the face of it, all of the elements of the proposed new section 36 would be met.

The proposed new test does not provide a clear line of reasoning to ensure that innovation without an authorisation is lawful

28. Clearly, it is not intended that a proposed new section 36 would prohibit innovation and cost reduction of this kind. However, we have not been able to identify a clear line of reasoning under the proposed new section 36 that would allow such conduct without an authorisation.

The costs of those false positives would be substantial, and authorisation would be an inappropriate solution

29. In principle, we support the proposal to provide for authorisation of conduct that may breach section 36. However, that must occur within the context of a properly framed prohibition.

Authorisation would not be an appropriate solution for those false positives

30. The ability to seek authorisation for conduct that would otherwise breach the proposed new section 36 is not the answer to the false positives problem we have described above.

31. For example, in relation to our first false positive example, it would not be appropriate to require public funders to obtain authorisations to carry out their functions.

32. In relation to our second false positive example, a requirement to obtain an authorisation before investing in a new means of production would have a chilling effect on innovation and investment. Information about a new product or service needs to be kept confidential so that it can commercialised. If authorisation is required, firms would be unable to innovate without making such information public, limiting their ability to commercialise their product or service. This would disincentivise innovation and investment.

The costs associated with those false positives are likely to outweigh any benefits of the proposed test

33. As we have previously identified, it is difficult to carry out a robust cost-benefit analysis of any proposed solution without a clear definition of the problem, or any evidence of the magnitude of that problem.

34. However, if our analysis of the effect of the proposed test is correct, the potential costs to the economy associated with the false positives that the proposed new test is likely to produce would be substantial. We have significant concerns that the costs associated with those false positives would far outweigh any benefits that may accrue from the reduced scope for false

negatives.

Other comments on the proposed solution

References to "that or any other market" under the current test

35. Under the current prohibition, a person with a substantial degree of power in one market is prohibited from taking advantage of that power to affect competition in another market. This is appropriate under the current test, because the current test requires a nexus between the market power and the intended anti-competitive effect.

The proposed test would prohibit some types of conduct even where the effects on competition are utterly incidental

36. Under the proposed new section 36, conduct that has the purpose, effect, or likely effect of substantially lessening competition in a market would be prohibited whether or not that market is the same market in which the relevant firm has a substantial degree of market power, but without the requirement that the firm engaging in the conduct be using its market power to bring about the intended effect.

37. One possible consequence of the proposed new test could be that conduct of a firm with a substantial degree of market power could be prohibited, even if the effect of that conduct on competition is utterly incidental. For example, take a hypothetical manufacturing firm with a factory in a small Southland town, and a second factory in Auckland. The firm finds a way to reduce the manufacturing capacity it requires, and closes its Southland factory. However, the firm happens to be a major employer in the small Southland town. As a result of the closure of its Southland factory, the town loses a major source of employment. The local housing and retail markets collapse, and there is a substantial lessening of competition in those markets.

38. Again, we are not suggesting that there is any intention that section 36 would prohibit conduct of that type. However, the scope of the proposed new section 36 is so broad that we cannot see a line of reasoning that excludes the result that, in closing its Southland factory, the manufacturer could be characterised as having breached section 36.

If adopted, the proposed test should be limited to prohibiting conduct that substantially lessens competition in related markets

39. If section 36 is amended to a "purpose or effect" test of the type proposed, one possible way to reduce the potential for this particular type of overreach and source of uncertainty would be to limit the scope of the prohibition to conduct that substantially lessens competition in the same market in which a firm holds a substantial degree of power and markets in which the firm supplies or acquires goods or services (as has been done in Australia). However, this option would not be sufficient to address

the concerns we have described in paragraphs 9 to 34 above. Accordingly, we submit that a "purpose and effects" test of the type we describe below would be preferable.

PREFERRED APPROACH: A TEST THAT TAKES INTO ACCOUNT PURPOSE AND EFFECT

We submit that any amendments to section 36 should require an assessment of purpose and effect

40. If the problem with the current formulation of section 36 is that it produces false negatives, in order to ensure that any amendments to section 36 produce net benefits compared with the status quo, we submit that a different approach is required. If section 36 is to be amended, we submit that it should only prohibit conduct that has the effect or likely effect of substantially lessening competition if the conduct has been carried out for an exclusionary purpose.

41. Our proposed formulation of section 36 takes into account both the purpose and effect of conduct by a firm with a substantial degree of market power. Section 79 of Canada's Competition Act is an example of a test of this type.

The Canadian test also requires an anti-competitive purpose and effect

42. To briefly summarise the Canadian test, three elements must be established to show a breach of section 79 of the Competition Act (Canada):

(a) one or more persons must substantially or completely control a class or species of business throughout Canada or any area thereof;

(b) that person or those persons must have engaged in (within the previous three years) or be engaging in a practice of anti-competitive acts; and

(c) the practice must have had, be having, or be likely to have the effect of preventing or lessening competition substantially in a market.

43. Canada's Competition Tribunal has interpreted the "anti-competitive act" element to require proof of purpose.[2] Canada's Competition Bureau, in its guide to the abuse of dominance law, reiterates that "an anti-competitive act is defined by reference to its purpose".[3] To demonstrate a breach of section 79, it is therefore necessary to prove both a practice of anti-competitive acts *and* an actual or likely effect of substantial lessening of competition.

The Canadian test allows for consideration of legitimate

44. The Bureau states that a factor to consider when determining whether an act is anti-competitive is whether it was in furtherance

[2] *Commissioner of Competition v Air Canada* 2003 Comp Trib 13, [54]
[3] Government of Canada "Abuse of Dominance Guidelines" (March 7 2019) Competition Bureau <www.competitionbureau.gc.ca>

business objectives

of a legitimate business objective.[4] The Canadian Federal Court of Appeal has said that a business justification must be a credible efficiency or pro-competitive rationale which relates to and counterbalances the anti-competitive effects of the act.[5]

45. Section 78 of the Canadian Competition Act outlines a non-exhaustive list of acts that are deemed to be anti-competitive. As we discuss in our response to Question 12, we do not consider it necessary for New Zealand's section 36 to provide for such a list.

A purpose and effect test would produce net benefits compared with the status quo

46. If the concern with the current formulation of section 36 is that it produces false negatives, replacing the current test with a combined purpose and effect test is more likely to produce net benefits compared with the status quo than the test the that Discussion Paper proposes. Concerns relating to false negatives appear to stem from the "take advantage of" element of the current section 36. A test that require an assessment of purpose as well as effect would:

    (a) produce benefits associated with reducing the scope for false negatives; and

    (b) minimise the risk of, and costs associated with, false positives of the types we have described above.

Our proposed test

47. We propose a test along the following lines:

> "*A person that has a substantial degree of power in a market must not engage in conduct that—*
>
> *(a) is for an exclusionary purpose; and*
>
> *(b) has, or is likely to have, the effect of substantially lessening competition in a market."*

Introduction of a new element to the Discussion Paper's proposed test: exclusionary purpose

48. Our proposed test adds an element relating to an exclusionary purpose to the test that the Discussion Paper proposes. Conduct of the types described in paragraph 15 of the Discussion Paper (predatory pricing, exclusive dealing, refusal to deal, high access pricing, and tying) are commonly recognised as having an exclusionary purpose, and would likely be caught by our proposed test. However, more benign or potentially beneficial types of conduct (such as innovation) would be unlikely to constitute conduct engaged in for an exclusionary purpose.

Exclusionary purpose preferred over Canada's

49. Consistent with Neil J Young QC's opinion in the Business Council of Australia's submission on the Australia's Competition

[4] Government of Canada "Abuse of Dominance Guidelines" (March 7 2019) Competition Bureau <www.competitionbureau.gc.ca>
[5] *Commissioner of Competition v Canada Pipe* 2005 Comp Trib 3, [73].

articulation of an anti-competitive act	Policy Review Bill 2016, the element we propose adding to the test in the Discussion Paper relates to an exclusionary purpose, as opposed to anti-competitive conduct (as adopted in Canada). This is because the word "exclusionary" more clearly relates to the purpose of conduct than the word "anti-competitive", which could also be interpreted as relating to effect.

RESPONSE TO DISCUSSION PAPER'S CONSULTATION QUESTIONS REGARDING SECTION 36

Question 1. Do you agree with the primary objective and the criteria?

50. The Discussion Paper states that its primary objective is the purpose of the Act. In principle, we agree that any amendments to the Act should be consistent with the purpose of the Act.

51. However, the Discussion Paper appears to have a dual purpose of eliciting evidence of a problem with section 36, and, at the same time, proposing solutions to that problem before it has been properly assessed.

52. As a consequence, as discussed in paragraphs 9 to 15 above, we have concerns that the Discussion Paper does not adequately assess the costs and benefits of each option in the Discussion Paper, relative to the status quo.

53. The test proposed in the Discussion Paper would undoubtedly reduce the scope for false negatives. However, given the absence of evidence relating to the magnitude of the problem of false negatives under the current formulation of section 36, we are concerned that any benefits associated with reducing the scope for false negatives would be outweighed by the costs of false positives. In particular, the potential for false positives is likely to deter competitive conduct, and other conduct that is for the long-term benefit of consumers. Such an outcome would be inconsistent with the purpose of the Act.

Question 2. 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?

54. We do not have any new evidence to offer on the costs and benefits of section 36 as currently worded. We have not seen evidence of section 36 producing false negatives. Rather, we submit that cases that have been decided under section 36 (such as the *Data Tails*[6] and *0867*[7] cases) have produced results that are consistent with the purpose of the Act.

Question 3. Do you agree that interconnected bodies corporate should be treated the same as a single firm?

55. Yes, we agree that this is appropriate.

[6] *Telecom Corporation of New Zealand Limited v Commerce Commission* [2012] NZCA 278.
[7] *Commerce Commission v Telecom Corporation of New Zealand Limited* [2011] 1 NZLR 577.

Question 4. Do you agree that "a substantial degree of power in a market" is an appropriate threshold for the prohibition?

56. Yes. We do not have concerns at this stage with "a substantial degree of market power" being the threshold for prohibition.

Question 5. Do you agree that a new prohibition does not require any equivalents to the Australian section 46(4)-(7)?

57. Yes, we agree that an equivalent of section 46(4)–(7) is unnecessary.

Question 6. Should a new prohibition define the types of proscribed conduct? Should a new prohibition describe or list the types of proscribed conduct?

58. In paragraphs 40 to 49 above, we propose a test that requires an assessment of the purpose and effect of a firm's conduct, similar to the Canadian equivalent to section 36. However, in contrast with the Canadian approach, we do not consider it necessary to include in the Act a non-exhaustive list of proscribed conduct.

59. We consider that the authority to determine whether conduct breaches the prohibition should remain with the judiciary. In addition, as reflected in paragraph 15 of the Discussion Paper, there are types of conduct that are commonly recognised as being for an exclusionary purpose. This suggests that there is no need for a codified list of proscribed conduct.

Question 7. Should the prohibition focus on purpose OR effects, purpose AND effects, solely purpose, or solely effects? Please provide reasoning.

60. As outlined in paragraphs 40 to 49 above, we submit that the prohibition should require an assessment of the purpose and effect of a firm's conduct. To achieve this, an additional element could be added to the test proposed in the Discussion Paper, so that section 36 also requires an assessment of whether a firm engaged in the relevant conduct for an exclusionary purpose.

61. For the reasons previously described, we have concerns that a prohibition that focuses solely on effects would not, in fact, produce net benefits relative to the status quo. We submit that incorporating an element relating to exclusionary purpose into the Discussion Paper's proposed test would:

    (a) improve on the status quo, by addressing the problem of false negatives in a way that reduces the potential for section 36 to give rise to new costs associated with false positives; and

    (b) better promote the purpose of the Act.

Question 8. 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?

62. If the scope of section 36 is broadened in the way proposed in the Discussion Paper, whether purpose is explicitly identified as an objective purpose is inconsequential. Either way, the test is likely to capture many false positives, such that it will not produce net benefits relative to the status quo.

63. If the current section 36 is maintained, or if it is modified to a purpose and effect test as we have proposed in paragraphs 40 to 49 above, whether the purpose is construed subjectively or objectively is of greater consequence. We believe that the existing case law provides appropriate guidance on the objective nature of the exercise of assessing purpose. A provision in the Act explicitly requiring an objective purpose is therefore unnecessary.

Question 9. 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?

64. Yes, we agree that "substantial lessening of competition" is the appropriate standard for the prohibition. If the standard is combined with some assessment of the purpose of the conduct, as we have proposed in paragraphs 40 to 49 above, the standard would provide enough certainty to assess conduct before it is undertaken. However, if the prohibition does not include an element relating to an exclusionary purpose, the standard is likely to capture a wide range of conduct that is not intended to be prohibited. We provide examples of such conduct in paragraphs 16 to 39 above.

Question 10. 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?

65. We submit that the place for balancing anti- and pro-competitive effects that occur in different markets is an authorisation process, not as part of the section 36 test itself.

Question 11. Should a "less restrictive alternative" test form part of the analysis when assessing conduct with both pro- and anti-competitive effects?

66. No, we submit that it is not the place of the regulator or the court to determine how a business is run.

Question 12. Are there any forms of anti-competitive unilateral conduct that should be specifically prohibited in the Commerce Act?

67. Provided that section 36 requires an assessment of whether conduct is for an exclusionary purpose (as outlined in paragraphs 40 to 49) we do not perceive a need for any forms of anti-competitive unilateral conduct to be specifically prohibited. We discuss this point further in our response to Question 6. The courts have already provided sufficient guidance in cases relating to section 27 of the Act to enable assessment on a case by case basis of whether conduct has the effect or likely effect of substantially lessening competition.

Question 13. Should the Act provide for secondary legislation to provide greater certainty for anticompetitive unilateral conduct? If so, who should hold the power to make secondary legislation?

68. No, we do not believe that secondary legislation is necessary or appropriate.

Question 14. Should authorisation be available for unilateral conduct?

69. In principle, we support making authorisation available for unilateral conduct, to allow the balancing of anti- and pro-competitive effects of unilateral conduct. This would reduce the potential cost associated with some types of false positives. However, that must be within the context of an appropriately framed prohibition.

70. As we have previously discussed, the test proposed in the Discussion Paper does not provide a clear line of reasoning under which some important categories of beneficial conduct (such as conduct by public funders to ensure the efficient use of public funds, or innovation by a firm with a substantial degree of market power) would be lawful. Authorisation applications are costly, lengthy, and public undertakings. As discussed in paragraphs 29 to 34 above, in many cases, authorisation will not be an appropriate mechanism to secure an outcome under which a firm with a substantial degree of market power can lawfully engage in beneficial conduct.

71. To address those scenarios, we propose incorporating an element relating to exclusionary purpose into the Discussion Paper's proposed test.

72. That approach would reduce, but not necessarily eliminate, the need for an authorisation regime. There may be some other types of beneficial conduct that would not be lawful under our proposed

test. An authorisation regime would go some way to address such concerns.

RESPONSE TO PROPOSED CHANGES TO INTELLECTUAL PROPERTY PROVISIONS AND COVENANTS

Intellectual property provisions

73. In principle, we agree that intellectual property should be treated the same as any other kind of property. We also agree that the scope of the current exceptions is unclear, and, in our experience, the exceptions are not commonly relied upon. We therefore do not oppose the proposed repeal of the exceptions.

74. However, to the extent that businesses do rely on the exceptions and have concerns about the impact of the repeal, further consideration should be given to how to promote predictability and certainty relating to the application of the Act to intellectual property.

Covenants

75. We agree that covenants should be treated consistently with contracts, arrangements, and understandings. To the extent that the covenants may not be contracts, arrangements, or understandings, we support a proposal to amend the Act to ensure that covenants are subject to the prohibition against cartel provisions. We do not have a preference as to how that is achieved.

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