Competition and Consumer Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140

By email

SUBMISSION ON REVIEW OF SECTION 36 OF THE COMMERCE ACT 1986

1 NZ Steel Limited (**NZS**) welcomes the opportunity to comment on the Discussion Paper.

2 We did not submit on the Targeted Review.[1] However, as a major New Zealand manufacturer, we wish to state our position: NZS supports the status quo. In saying we think it bears emphasis that the current legal position has been thoroughly tested and explained by the New Zealand Supreme Court.[2]

3 On the publicly available material before MBIE, we see no demonstrable need to replace the current, well-understood, regulation of unilateral conduct with a new regime. Doing so will create uncertainty and compliance costs for New Zealand business. We appreciate others have made that observation already. But it warrants repetition. There will be a chilling effect as some businesses become more cautious around investment decisions for fear of investigation. Moreover, it is not fair to say that existing New Zealand law is out of line with other jurisdictions. There is no "right way" to regulate market power. The International Competition Network, for example, has found that "there is no universal, all-encompassing approach to identifying exclusionary behaviour".[3] And while MBIE favours a pure effects test we note that neither the US, EU nor China has such an approach.[4]

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1 We are, though, a member of Business NZ and we support that organisations submissions.

2 *Commerce Commission v Telecom* [2011] 1 NZLR 577 (SC). And twice test and explained by the Privy Council in decisions followed by the Supreme Court.

3 International Competition Network (ICN) "Unilateral Conduct Workbook: Chapter 1 – the objectives and Principles of Unilateral Conduct Laws" (presented at the 11th ICN conference, Rio de Janeiro, Brazil, 2012) at [33]-[34] and [43] available at www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf.

4 On the US position, see the cases and commentary on the Department of Justice website at: https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1#N_4. On the EU position, European Commission, "*Guidance on Commission enforcement priorities in applying Article 82 [now Article 102] to exclusionary conduct by dominant*

4 Standing back, we are also concerned that regulatory reform across the board is making New Zealand a more difficult and costly place to do business for companies like NZS.

5 For NZS, these proposed changes to trade practice law sit alongside mooted reform in areas like emissions trading, transmission pricing methodology and dumping. At some point compliance cost and uncertainty tip the balance and our New Zealand-based manufacturing operations become unattractive to our foreign owner.

6 Given NZS does not support MBIE's initial proposition, we only answer the Discussion Paper's question 16 below. But first, we offer a little more detail on our company for context.

COMPANY OVERVIEW

7 NZS has been producing steel at Glenbrook for over 50 years. We are New Zealand's sole integrated producer of flat rolled steel products for the building, construction, manufacturing and agricultural industries. We use locally sourced iron sand to produce around 650,000 tonnes of steel a year. NZS contributes over $600 million to the NZ economy and supports more than 4,000 jobs directly and indirectly, primarily in a regional setting. We are a significant user of local and national infrastructure, consuming more than 400GWh of grid electricity each year and accounting for 5% of the tonnage on the national rail network.

8 NZS is highly exposed in the New Zealand market to import competition and competition from inter-material substitutes. Indeed, NZS sets pricing for the vast majority of its domestically sold steel products relative to the pricing of similar imported steel products. This import parity pricing model reflects the reality that large steel distributors and other buyers can and do purchase from offshore all the time. Indeed, global production overcapacity has depressed steel prices and resulted in many offshore producers—particularly in China and Thailand—selling large volumes of cheap or even below-cost steel into certain markets, including New Zealand.

9 Like any other steel mill operator, NZS must operate Glenbrook at or near full capacity to ensure efficiency. To maximise domestic volumes and maintain a viable scale, NZS competes against imports and other substitutes by offering superior product features and customer benefits, including market-leading warranties,

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firms" dated 2 December 2008: http://europa.eu/rapid/press-release_MEMO-08-761_en.htm?locale=en; And with China, we point you to Article 17 of the 2008 Anti-monopoly law of the PRC, available here: http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml.

reputable brands such as COLORSTEEL®, Zincalume® and GALVSTEEL®, products optimised for local conditions, technical and after-sales support, shorter lead times and smaller orders than imports, and volume related discounts.

10 In the circumstances, MBIE will understand NZS wishing to see optimised regulation given over-regulation has an immediate negative impact on the sustainability of our New Zealand operations.

QUESTION 16: DO YOU SUPPORT [MBIE'S] INITIAL PROPOSITION? IF NOT, WHY NOT?

11 We do not support MBIE's suggestion of replacing s36 with a modified version of Australia's "effects test" for unilateral conduct.

12 We have two inter-related reasons:

12.1 First, MBIE does not advance appropriate evidential support for its proposed reform. And without that evidence the mooted effects test would simply carry a marginal cost impact that would not be off-set by anticipated benefits.[5]

12.2 Secondly, Part 2 of the Commerce Act, read as a whole and in conjunction with Part 4 – as it must be – contains the legislative tools to deter and prosecute any misuse of market power in this country.

13 We briefly elaborate on those two points below.

Lack of empirical evidence

14 We note that section 4 of the Discussion Paper sets out "three main problems" with the current s36 test which lead MBIE to conclude that the section is "unsatisfactory".

15 Those problems are that s36: (1) allegedly produces false negatives; (2) is hard and expensive to enforce; and (3) creates unpredictability in "day-to-day decision making". At paragraph [49] the Discussion Paper says "evidence for the three main problems is provided below". And yet the paragraphs that do follow, paragraphs [50]-[76], do not contain the promised evidence.

16 On false negatives, the only support MBIE advances for their existence comes from: (1) an ACCC submission to the Australian Treasury; and (2) a piece of academic writing from American, Andy Gavil, on how a US *Microsoft* case from the 1990s might be decided in New Zealand today. Those references do not identify a problem

[5] Compare with MBIE's assessment of costs and benefits on the proposed effects test at paragraph [202] of the Discussion Paper.

with New Zealand law that needs to be addressed by Parliament. Tellingly, at paragraph [58], MBIE records that:

> *the [Commerce] Commission has not been able to indicate whether it has foregone investigations where it considered there was a substantial lessening of competition but it believed the conduct would not constitute taking advantage of market power (a "false negative").*

17 Moreover, at paragraph [59] MBIE concludes that it has:

> *proved difficult to find evidence of actual harm occurring. However absence of evidence is not evidence to the contrary*.

18 All we observe in response is that no evidence is no evidence. And in our submission, to have a mandate to change the law in a significant way, at significant cost to business, requires evidence that the law is not working. And again, as MBIE records, there is no such evidence.

19 On cost and complexity, we observe that an effects test will simply result in differently complex and similarly expensive s36 litigation. We think the complexity MBIE points to simply reflects the reality that some markets are more complex than others. And, for better or worse, a good deal of New Zealand's leading s36 jurisprudence has come from the telecommunications industry. Telecommunications is complicated. In simpler cases like, say, *Melway* (involving street maps), *Rural Press* (involving newspapers) or *Boral* (involving concrete blocks), the counterfactual is relatively straight forward. Complex facts make for complex market power cases, not the so-called "counterfactual test". What is more, the proposed effects test will, on most occasions, pitch two future hypothetical situations against one another: the future with the impugned conduct in play; the other without it. That form of counterfactual assessment will involve just as much expensive expert evidence as the current approach to s36 analysis.

20 Lastly, on the third alleged "problem" with s36 – the idea that the current law is unpredictable for business – all we can say is that we have had no such experience. To the contrary, we consider the current law to be clear and well able to guide our operational decisions.

Commerce Act is fit for purpose as it stands

21 At paragraphs [183] to [186] the Discussion Paper notes that:

> *Some submitters argued that section 27 is an appropriate backstop for the under-inclusive nature of section 36… This discussion ignores the crucial distinction between section 27 and section 36. Section 27 is aimed at*

agreements between parties whereas section 36 is aimed at the conduct of a single party.

22 With respect, that observation does not seem a fair or accurate assessment of the compelling point many submitters have made so far.

23 Sections 27 and 36 work together to prevent unilateral and concerted trade practices which damage workable competition.

24 Section 27 confronts commerce which can foreclose rivalry and innovation in markets. Conduct like tying, bundling, rebating, and exclusive dealing arrangements. Since the beginning of Commerce Act litigation, the Court of Appeal was clear that s27 is not simply concerned with concerted action or collusion. The section covers unilateral conduct too.[6]

25 For its part, s36 augments s27 – and the other Part 2 provisions – by tackling unilateral action such as refusing to deal, margin squeezing and predatory pricing. There is plainly no difficulty with a provision like s27 covering both anti-competitive action by a single firm and anti-competitive conspiracies because that is exactly what MBIE's proposed new s36 will do.

26 The Discussion Paper is right, of course, that: "sometimes unilateral conduct will manifest itself in agreements between parties [attracting s27 attention] but sometimes there is no agreement or proving an agreement is inappropriate", in which case you're in s36 territory. But we see no difficulty there either.

27 In cases involving what you might call "truly unilateral conduct", s36 asks the right question: would you rationally refuse access, squeeze margins or price below cost if you faced greater competition? If the answer is no, then the exclusionary conduct is enabled by the defendant firm's market power and appropriately condemned under s36. With "truly unilateral conduct" you need this causation element lest the law force large firms:[7]

> *to stand idly by as [they] see [their] market share being eaten into by others who are not dominant. That would be stifling competition – the very thing [s36] is designed to promote for the consumer's benefit.*

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6 *Tui Foods Ltd v New Zealand Milk Corporation Ltd* (1993) 5 TCLR 406 (CA) at p410; *Port Nelson v Commerce Commission* [1996] 3 NZLR 554 at p563.

7 *Carter Holt Harvery v Commerce Commission* [2006] 1 NZLR 145 (PC) at [23] per Lord Hope.

28 The fact is that an alleged abuse of market power can breach s36, s27 or both depending on the facts. The two sections work in tandem. Moreover, as the Privy Council has observed:[8]

> *Section 36 is only part of an overall statutory machinery for dealing with trade practices which operate to the detriment of consumers. Another part of such machinery (Part 4) is specifically directed to the regulation of prices in markets which are not fully competitive.*

29 We see nothing in the Discussion Paper to suggest MBIE has fully considered s36 in its wider context. And for us, that wider context is a competition statute that is fit for purpose in a country like New Zealand with, inevitably, shallower markets.

30 In conclusion, we note again that there is no internationally accepted right way of regulating unilateral conduct in a competition statue. And there is no such thing as a single well-understood effects test which looks purely at the market impacts of a dominant firm's conduct. Again the European, Chinese, and United States positions differ and there is no consensus approach. Each jurisdiction has thresholds and safeguards that would be absent on MBIE's initial proposition. For example:

30.1 The American courts have consistently emphasised that s2 of the Sherman Act is only intended to capture conduct which intentionally harms competition itself: that is because robust, competitive conduct by any one firm, even with market power, benefits consumers. Hence the Supreme Court's emphatic rulings that to breach s2 of the Sherman Act a firm must "wilfully" acquire or maintain its monopoly position.

30.2 In a similar vein, the European market power test looks at whether conduct has had an "exclusionary effect" but then admits a range of defences based on efficiency and/or legitimate business rationale. Those defences are intended to stress-test the causal link between the defendant firm's market power and the exclusionary marketplace effects of the conduct – in other words, precisely what the "use" requirement in existing s36 does already on existing New Zealand law.

30.3 China's anti-monopoly law likewise prohibits the abuse of a dominant market position "without justifiable reason", requiring an examination of the linkage between the rationale for the conduct and its marketplace effect.

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8 *Telecom v Clear* [*1995*] 1 NZLR 385 (PC), at p 404 per Lord Browne-Wilkinson.

NEXT STEPS

31 We would be pleased to meet with officials at any stage to discuss our concerns. We appreciate the opportunity to present our view.

Yours sincerely,

Jason Dale

Chief Financial Officer

New Zealand Steel