

**Submission to the Ministry of Business, Innovation and Employment
T&G Global Limited**

1 April 2019

INTRODUCTION

1. T&G Global Limited ("**T&G**") is grateful for the opportunity to submit on the *Review of Section 36 of the Commerce Act and other matters Discussion Paper* ("**Discussion Paper**").

ABOUT T&G

2. T&G is a significant participant in New Zealand's fresh produce industry, including being New Zealand's largest exporter of apples.
3. Consequently, T&G makes significant investments in research and development associated with developing new varieties of apples that will be attractive to consumers, both in New Zealand and internationally. The choice of country, as to where the investment is to be made and/or where the intellectual property will be licenced, depends heavily on the clarity and certainty of the legislative position in that country, underpinning the ability to secure an acceptable return the investment.

EXECUTIVE SUMMARY

The misuse of market power prohibition

4. T&G does not object to the proposal to amend the misuse of market power prohibition to the purpose/effect test set out at [11] of the Discussion Paper.
5. However, as it stands, T&G considers that the Proposed Test:
 - (a) lacks sufficient safeguards to protect against the over-capture of legitimate commercial activity (to the extent that it extend to "effects" and "likely effects"); and
 - (b) risks making businesses liable for consequences that were not, at the time the business entered into the conduct, reasonably foreseeable (by virtue of the "effects" limb).
6. Both of these aspects of the Proposed Test risk chilling procompetitive activity.
7. T&G would therefore propose including a specific exemption for conduct by businesses with a substantial degree of market power which:
 - (a) was for the dominant purpose of protecting a legitimate business interest; and
 - (b) was reasonably necessary to protect that legitimate business interest.

The removal of the intellectual property exemptions

8. T&G does not support the removal of the IP-related exemptions, because:
 - (a) there is insufficient evidence to suggest change is necessary;

- (b) repeal of the IP-related exemptions is likely to result in business uncertainty, which is particularly harmful in the intellectual property sphere; and
- (c) if change is to occur, it should occur in a process distinct from the market power reforms, once it is clearer how the new test will operate in practice, and pursuant to a more robust independent review of the benefits and risks of retaining the current legislative settings around the intersection between competition law and IP.

THE MISUSE OF MARKET POWER PROHIBITION

9. T&G does not have a principled objection to the proposal to amend the misuse of market power prohibition to the purpose/effect test set out at [11] of the Discussion Paper ("**Proposed Test**").
10. However, as it stands, T&G considers that the Proposed Test (in particular, the "effects" and "likely effects" limbs) lacks sufficient safeguards against the over-capture of legitimate commercial activity.
11. For example, T&G is concerned that a business with a substantial degree of market power would be prevented from refusing to supply a downstream customer, even when there is a legitimate business justification for that refusal (for example, if the customer was a credit risk or if capacity constraints made supply impossible). This legitimate and justified business decision, which was not made for an anticompetitive purpose, could still be captured by the "effects" and "likely effects" limbs of the Proposed Test.
12. In addition, T&G is concerned that including an "effects" limb (as distinct from a "likely effects" limb) would result in the "effects" being assessed weeks, months, or even years after the conduct in question, and businesses therefore being liable for consequences that were not, at the time the business entered into the conduct, reasonably foreseeable. The uncertainty inherent in this position would be likely to chill pro-competitive activity.
13. The fact that the test in s 27 of the Commerce Act 1986 ("**Commerce Act**") also contains all three limbs – "purpose", "effect" and "likely effect" – is not a compelling argument for replicating that test in the s 36 context, and does not disprove the notion that an "effects" limb will chill pro-competitive activity. Section 27 relates to bilateral / multilateral agreements between businesses, which, by their very nature, are slower and more methodical processes.
14. Bilateral / multilateral agreements are typically subject to rigorous legal review (often by each party independently), and can generally be more easily unwound / terminated if unforeseen events in-market subsequently increase the competition risk of those agreements. Unilateral conduct, by contrast, may not be subject to the same kind of lengthy legal review (as it may simply take the form of 'course of business' conduct), and may be harder to reverse once it has generated an effect (however unintentional).
15. To subject businesses to an *ex post* review of otherwise unforeseeable effects therefore carries a materially greater risk of chilling pro-competitive conduct in the context of s 36.
16. To guard against these risks, T&G submits that any introduction of the Proposed Test should be accompanied by a specific carve-out for conduct which has a legitimate business justification. That carve-out should exempt conduct by businesses with a substantial degree of market power which:
 - (a) was for the dominant purpose of protecting a legitimate business interest; and

(b) was reasonably necessary to protect that legitimate business interest.

17. T&G's view is that an exemption of this nature will ensure that businesses with market power are not deterred from making decisions which, despite their legitimate purpose, may have the effect or likely effect of substantially lessening competition (and would therefore otherwise be captured by the Proposed Test).

THE REMOVAL OF THE INTELLECTUAL PROPERTY EXEMPTIONS

18. T&G does not support the removal of the intellectual property ("IP")-related exemptions, for several reasons.

There is no evidence to suggest change is necessary

19. There is no evidence to suggest that the exemptions as currently drafted are sub-optimal or problematic. The Discussion Paper expresses concern that the exemptions may risk 'false negatives', but goes on to acknowledge that "We are not aware of specific New Zealand examples of the IP provisions in the Act enabling anti-competitive conduct to go undeterred."
20. The Discussion Paper hypothesises that this may be because private litigants are dissuaded from bringing cases under the current provisions. This is purely speculative; there is no reason to prefer this possibility over any other alternative – including the possibility that in a small market such as New Zealand's, such fact scenarios simply do not arise very often. Indeed, in relation to s 36(3), it is illogical to claim that a dearth of precedent is indicative of a mis-calibration of that subsection, while at the same time claiming earlier in the Discussion Paper that the counterfactual test in s 36(1) has caused a steep decline in s 36 cases generally. It is also a reason, as will be discussed in further detail **below**, not to bundle the issue of the IP-related exemptions into a more substantive 'misuse of market power' review.
21. T&G submits that a stronger case than mere speculative harm should be made before engaging in any substantive statutory amendments. This is clearly the approach endorsed by the *Legislation Guidelines 2018* (promulgated by the Legislation Design and Advisory Committee) which state that:¹

What is needed (or not needed) in the legislation to implement the policy objective and solve the policy problem (see Chapter 2)—remember to step back and assess whether legislation is really needed and make sure to look at whether the existing regime, common law, or non-legislative solutions are already apt to meet the purpose.

...

Legislation should only be made when it is necessary and is the most appropriate means of achieving the policy objective. Unnecessary legislation should be avoided because it involves significant costs.

22. T&G submits that a sufficiently compelling case for repeal / amendment of the IP-related exemptions has not been made.

¹ At [11] and [14].

Repeal of the IP-related exemptions is likely to result in business uncertainty, which is particularly harmful in the intellectual property sphere

23. As MBIE acknowledges in its Discussion Paper, legislative amendments are often accompanied by business uncertainty, and the chilling of pro-competitive conduct.
24. This is particularly true in the context of IP, where the investment case for undertaking innovative activity can be finely-balanced, and therefore require a high degree of *ex ante* certainty of return in order to justify. Lemley and Shapiro observe in the context of patents that:²

Virtually all property rights contain some element of uncertainty. The owner of real estate may find that the title to that property is flawed; title insurance exists to deal with this risk. The (careless) owner of a trademark may find that its mark has been used so widely as to become a generic term, thus losing trademark protection. But the uncertainty associated with patents is especially striking, and indeed is fundamental to understanding the effects of patents on innovation and competition. There are two fundamental dimensions of uncertainty: 1) uncertainty about the commercial significance of the invention being patented, and 2) uncertainty about the validity and scope of the legal right being granted. Uncertainty about commercial significance is critical when studying the process by which patents are issued. Uncertainty about validity and scope are critical when studying the enforcement and litigation of patents.

25. From T&G's perspective, the significant time and financial investment made in the attainment of patents / Plant Variety Rights ("**PVRs**") necessitate clear licencing arrangements to give all concerned (i.e. both licensor and licensee) comfort that there will be a suitable return on investment.
26. Of course, the fact that legislative amendment may be likely to cause business uncertainty is not in itself a reason not to carry out such an amendment. It is, however, a reason to refrain from such amendment unless a compelling case can be made for it. If the case for legislative change is speculative, as T&G has argued above is the case here, retention of the status quo is preferable.

If change is to occur, it should occur in a process distinct from the market power reforms, and pursuant to a more robust independent review

27. The uncertainty likely to be caused by repeal of the IP-related exemptions is significantly compounded by proposing a repeal of those exemptions:
- (a) concurrently with a significant amendment to the misuse of market power prohibition; and
 - (b) at the same time as MBIE is reviewing the Plant Variety Rights Act 1987.
28. Both of the above legislative changes may represent significant departures from the status quo, and it is likely that T&G – and other companies in a similar position – will be required to invest a material degree of time and cost navigating the uncertainties consequent upon those changes. T&G submits that to remove the IP-related exemptions at the same time would multiply this time and cost to a degree not justified by the speculative case for repeal.

² Mark A. Lemley and Carl Shapiro, 'Probabilistic Patents' (2005) 19 *J. Econ. Perspectives* 75.

29. If change is to occur, T&G submits that such changes should be:
- (a) staggered so as to avoid the compounding of uncertainty mentioned **above**; and
 - (b) subject to a more fulsome review, which:
 - (i) more clearly sets out the case for repeal or amendment; and
 - (ii) considers the IP-related exemptions in the broader context of the Plant Variety Rights Act 1987 review, and the IP framework more generally.
30. In addition to the above, the inclusion of a "legitimate business justification" defence within s 36 (which T&G has argued for at 16 above), would moderate the uncertainty that would otherwise accrue under that section to IP rights-holders unsure of the legality of an exercise of their IP rights.

CONCLUSION

31. T&G is grateful for the opportunity to submit to MBIE on the Discussion Paper.
32. All enquiries on the submission may be directed to:

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