Submission on Targeted Review of the Commerce Act 1986

This submission is made by Donal Curtin, Managing Director, Economics New Zealand Ltd. I have no objection to its publication in its entirety. I have no Privacy Act disclosure issues. Not all questions in the Issues Paper (IP) have been answered.

Anti-competitive exclusionary conduct

Q1 Yes.

Q2 Yes.

Q3 Yes, but it would have been helpful to include an example where a firm had indeed been shown to have 'taken advantage' for an exclusionary purpose (the INZCO case is an example of *not* 'taking advantage' and the Turners & Growers case is an example of *not* having an exclusionary purpose). I appreciate that the difficulties in prosecuting s36 cases make examples rare, but the 'data tails' case (mentioned in Appendix A) would be a good example of what s36 is meant to curb. It is also worth pointing out that this occurred in a sector of high national importance (the rolling out of additional telecommunications infrastructure).

Q4 The justification for 'take advantage' - "The courts have explained that their adoption of this rule is to provide businesses with certainty *ex ante* as to whether their conduct is lawful and to minimise the risk of a chilling effect on large businesses competing" (IP p22) - is not strong, for two reasons. One, the search for 'certainty' is a chimera: this is an area universally acknowledged as inherently complex and not susceptible to 'silver bullet' uncertainty dispersal. Two, if more certainty is desirable rather than less, then the 'take advantage' approach fails: what might have happened in a hypothetical counterfactual world (or worlds) is self-evidently a more subjective and uncertain approach than examining the effects of firm actions on competition in real world markets. As the current chair of the Commerce Commission has written (in his personal capacity), "The application of monopoly rules based on hypothetical thought experiments, involving the creation of make-believe market structures and predictions of behaviour in make-believe worlds, is highly problematic"[1]

Q7 Yes and no. Yes on the long term interest of consumers, simplicity and alignment. No on the supposed relevance of New Zealand as a small and remote economy, where

1http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/berry_november_12.pdf

neither of the options stated is a good course for policy. The first option - "it could be argued that powerful firms should be allowed some leeway...This is the 'national champion' argument" - is distinctly dubious from several perspectives, and was regarded sceptically by Australia's Competition Policy Review (the 'Harper review') which said (p318):

From time to time, there are calls for competition policy to be changed to allow the formation of 'national champions' — national firms that are large enough to compete globally...

While the Panel agrees that the pursuit of scale efficiencies is a desirable economic objective, it is less clear whether, and in what circumstances, suspending competition laws to allow the creation of national champions is desirable from either an economic or consumer perspective…

Porter and others note that the best preparation for overseas competition is not insulation from domestic competition but exposure to intense domestic competition. Further, the purpose of the competition law is to enhance consumer welfare, including through ensuring that Australian consumers can access competitively priced goods and services. Allowing mergers to create a national champion may benefit the shareholders of the merged businesses but could diminish the welfare of Australian consumers.

The Harper review concluded (correctly in my view) that the best option, if there are indeed net public benefits from allowing leeway in some circumstances, is to run them through the established authorisation process, rather than amend competition law (Harper review, p319):

The merger authorisation process...applies a public benefit test that covers all potential benefits and detriments of a merger, including economies of scale. In this way, the current law recognises there may be occasions where it is in the public interest to allow a particular merger to achieve efficient scale to compete globally, notwithstanding that the merger adversely affects competition in Australia.

The second option - "it might be argued that powerful firms should be subject to stricter rules than abroad" - is equally dubious. Firms already operating in a "small and remote" economy are unlikely to be helped by being more handicapped in their business activity than firms in larger, more central countries, nor is the long-term interest of consumers well served by tougher than overseas restrictions on the intensity of competition among bigger businesses.

Q8 No. The long-term benefit of consumers should take priority.

Q9 Yes. The 'type 2' errors mentioned by the chair of the ACCC (p28) seem *a fortiori* true of New Zealand, where an even more abstruse counterfactual regime prevails, and where there has been a limited number of s36 cases taken and an even smaller number successfully established. Other than the rare, effectively black and white case where no conceivable non-exclusionary counterfactual can be made out, the counterfactual tends to be overforgiving of damage to the competitive process.

Q10 No, not as baldly as that. As I have said elsewhere[2]

2 http://economicsnz.blogspot.co.nz/2015/11/black-hats-or-grey.html

Businesses very often *won't* know if they are acting in a way that they would not in a competitive market. That's precisely why we, and the Aussies, and competition authorities globally, have been having these rethinks about defining abuse of market power and policing it: it's a grey area, where reasonable people can come to different conclusions. What is vigorous but fair competition by a big company can be very hard to tell from tactics that exploit the company's bigness to skew the competitive playing field. In fact, that's exactly what the (in)famous *Pink Batts* case (which MBIE cites) demonstrated: courts took different views, with the House of Lords, who had the last bite of the cherry, taking the vigorous but fair line.

The biggest current example is Google's bunfight with the EU competition police. Is it really abundantly clear that Google's giving higher rankings in search results to companies that advertise with it is "anti-competitive"? If you, um, google it, you'll readily find experts on both sides.

I wasn't born yesterday: of course, there will be instances where there are guys in black hats who know they are wearing them. There have been clear cases where competition authorities have spotted and pinged egregious behaviour that would have been found anti-competitive on pretty much any reasonable definition of abuse of market power.

But it's not the right way to typify where many companies are likely to find themselves - in the real, greyer world.

There will never be simple, clear resolutions to issues of alleged exclusionary use of market power. But there can be less complex and more timely options than our current arrangements.

Q11 Yes, with the counterfactual requirement a key cause.

Q12 Yes. Table 2 is a stark summary of how out of step New Zealand is internationally, with its 'take advantage'/'purpose' regime shared only with Australia. Furthermore, Australia may well change (if the Harper approach is followed) and in any event currently interprets 'take advantage' less artificially than we do under our counterfactual approach. We are at some risk of moving from somewhat isolated to completely on our own.

Q13 I am unconvinced (see response to Q7) that the "small and remote" criterion is appropriate in the first place. It is questionable on its own terms, which is one reason why both the policy options mentioned as potential responses look inadvisable.

Q14 Yes. The reasoning behind "national champion" arguments is weak, but that is not down to MBIE. While the "small and remote" criterion is dubious, it needed to be surfaced.

Q15 Timeliness gets passing mention, but it deserves more emphasis. Some of the delays in resolving s36 cases reflect the generally slow pace of the courts in dealing with major litigation of all kinds. But where simplification/amendment of s36 would accelerate the process, then it would be welcome. *0867* is a classic example – a s36 case that dated from the days of dial-up internet access, but which was eventually decided well into the broadband era.

Q16 Yes, and precisely for the reasons stated in the conclusion.

Q17 Yes. I was impressed by the speed with which Australia progressed the Harper review, and we could usefully aim at matching their timeframes.

Q18 Options 1 to 4 only. Part of Option 1 is the status quo; all the others have the potential to take us towards better outcomes that also more closely align with orthodox overseas economics and jurisprudence. The only change might be if Australia's current discussion of what to do about the Harper review's recommendation on their s46 throws up some further options, in which case we should include them, too, so as to retain the potential for fuller trans-Tasman alignment of competition law.

Q19 Everything other than options 1 to 4. Heterodox, "out of the box", idiosyncratic regimes are the last thing a small economy needs, for all the reasons that people buy shrink-wrapped spreadsheet software rather than coding their own.

Q20 No.

Q21 An alignment of criteria looks sensible.

Alternative enforcement mechanisms

Q31/Q40 The Issues Paper quotes (p43) John Land's comment that "the relative lack of use of cease and desist orders may be the result of the relatively cumbersome procedure required for such an order to be issued" and says (p47) that if the cease and desist power were used more, it "would be unlikely to be cost-effective and timely, due to its cumbersome procedural requirements". In retrospect, it appears that what was intended to be a fast-track option was over-engineered into a slower-than-an-injunction option. But the need for quick response remains, particularly in fast-changing industries. A better answer might be to go back to the original fast track intentions.

Q41 For the reason stated in the previous response, although the tenor of the Issues Paper would appear to lead in the direction of Options 3 or 4, I support including Option 2.

Market studies

Q45 Yes, there is a gap, which I have described elsewhere[3]:

Imagine this: the police view their role as solely responding to complaints.

There won't be any patrols to keep areas safe: the police cars will only arrive if someone rings up and says there's something bad going down locally. There won't be booze bus checkpoints: drivers will be breathalysed only if they've already crashed into someone. There won't be undercover operations: the meth factory won't be found unless it gets dobbed in. You get the picture.

Or consider fisheries protection. Will there be a ranger out on the beat checking that nobody is netting

3 http://economicsnz.blogspot.co.nz/2015/11/the-case-for-market-studies-again.html

everything out of your favourite trout river? Nope. Anyone checking the health of species stocks? Sorry. Giant trawler scooping up everything in Golden Bay? "What a shame. If only someone had rung in and told us"....

But that, folks, is pretty much where we are when it comes to policing the state of competition in New Zealand. As [the Issues Paper] reminded us (p55), "there is no single, broad power to investigate any market from a competition perspective and make recommendations on how improvements can be made, as is found in comparable jurisdictions"

Sections 4.5.1 and 4.5.2 of the IP make a cogent case for the existence of a gap. I agree that the 'prelude to enforcement' argument in section 4.5.3 is not a gap, and with the IP's view (p57) that "Any utility gained by instituting a market studies power *that is explicitly a precursor to enforcement* would likely be outweighed by such a power's disadvantages" (my italics).

Q46 I have written a longer piece[4] on the argument for market studies which addresses many of this questions in more detail, but succinctly:

Q46a The Commerce Commission. It has by a wide margin the broadest and deepest competition expertise. Where there are concerns about potential promotion of agency self-interest, for example, they could be tempered in a variety of ways (eg by temporary appointment of Associate Commissioners, or by independent academic or other review). In any event similar concerns would also apply to any other agency given a market studies mandate.

Q46b The Commerce Commission on its own initiative, or when requested by a Minister.

Q46c Yes. I agree, however, with the observation (p52) that "A common theme in the literature is that while mandatory information-gathering powers are desirable, they should be used sparingly if possible".

Q46d The body should have a broad remit, including the ability to make policy recommendations. I agree however with the observation (p52) that the UK Competition and Market Authority's remedies powers and duties look to be "at the extreme end of the scale", and that granting remedies powers in New Zealand along UK lines would risk creating too much of a "judge and jury" regime.

Q46e Yes. It has merit in its own right, but also fits well with increased public accountability and oversight when non-elected authorities are granted increased powers.

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4 'Is the competition toolkit missing its torch? The case for market studies', available at https://www.dropbox.com/s/txmzxdmlf3bj0n1/The%20Case%20for%20Market%20Studies.pdf?dl=0