**MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT**

**COVERSHEET**

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**Information redacted**

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Review of Section 36 of the Commerce Act 1986 and Other Matters: Policy Decisions

Portfolio Commerce and Consumer Affairs

On 12 February 2020, the Cabinet Economic Development Committee (DEV):

Background

1 noted that on 5 September 2018, DEV:
   1.1 agreed to the release of a discussion document on proposed changes to the Commerce Act 1986, namely to strengthen the prohibition against anti-competitive unilateral conduct (section 36), repeal the Act’s intellectual property provisions, and make technical changes relating to covenants;
   1.2 invited the Minister of Commerce and Consumer Affairs to report back on the outcome of consultation and with any proposed policy changes;

Section 36

2 noted that 23 submissions were received on the issue of section 36 of the Commerce Act, with stakeholders relatively evenly divided between being for, against, or neutral towards reform;

3 agreed to amend section 36 of the Commerce Act to prohibit persons with a substantial degree of power in a market from engaging in conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market;

4 agreed that authorisation from the Commerce Commission be available for conduct which may breach section 36 of the Commerce Act, but which is ultimately in the public interest;

Intellectual property

6 noted that 14 submissions were received on the issue of repealing the safe harbours for intellectual property, with most stakeholders either neutral or opposed to reform;
agreed to repeal the safe harbours for intellectual property in sections 45, 36(3), and 7(2) of the Commerce Act, and in section 7(3) to the extent that it relates to intellectual property;

invited the Minister of Commerce and Consumer Affairs to invite the Commerce Commission to prepare guidelines on its enforcement approach in relation to intellectual property under the Commerce Act once amended;

Other matters

agreed to prohibit covenants that create or implement a cartel, in the same way as contracts;

agreed to amend the Commerce Act to clarify that the Act’s provisions relating to anti-competitive conduct apply to interests in land, without substantively extending the Act’s scope;

agreed to increase the maximum pecuniary penalties for anti-competitive mergers to align with those relating to anti-competitive agreements contained in section 80 of the Commerce Act 1986;

agreed to increase the maximum number of Commerce Commissioners from six to eight;

agreed to amend the Commerce Act to provide that the Commerce Commission may share information that it holds in relation to its functions under the Act, or any other Act that it enforces, with other government agencies or regulators, subject to safeguards relating to the use and storage of that information;

Legislative implications

agreed to give effect to the above proposals through a Commerce Amendment Bill;

noted that a Confidential advice to Government is being sought on the 2020 Legislation Programme;

invited the Minister of Commerce and Consumer Affairs to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above paragraphs;

authorised the Minister of Commerce and Consumer Affairs to make additional policy decisions and minor or technical changes, consistent with the policy intent of the paper under DEV-19-SUB-0007, on issues that arise during the drafting process.

Jack Petterson
Committee Secretary

Hard-copy distribution: (see over)
Present:
Hon Kelvin Davis
Hon Phil Twyford
Hon Dr Megan Woods (Chair)
Hon Chris Hipkins
Hon Stuart Nash
Hon Iain Lees-Galloway
Hon Jenny Salesa
Hon Damien O’Connor
Hon Tracey Martin
Hon Shane Jones
Hon Kris Faafoi
Hon Willie Jackson
Hon James Shaw
Hon Shane Jones
Hon Julie Anne Genter
Hon Eugenie Sage

Officials present from:
Office of the Prime Minister
Officials Committee for DEV

Hard-copy distribution:
Minister of Commerce and Consumer Affairs