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19 February 2016

Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON

Email to: commerceact@mbie.govt.nz

Dear Sir/Madam

Re: Targeted Review of the Commerce Act 1986

I am writing to you regarding the Ministry of Business, Innovation & Employment (MBIE) Issues Paper, *Targeted Review of the Commerce Act 1986* (referred to as 'the Issues Paper').

BusinessNZ submitted on the New Zealand Productivity Commission's (NZPC's) 2013/14 report on the New Zealand's Services Sector. The report included an examination of and recommendation on section 36 of the Commerce Act 1986 (s36), detailed below. The Issues Paper adopts a similar line. But in the result, the Paper does not convince us that New Zealand must change s36, or introduce market studies. Any reform in this area will create uncertainty and saddle business with unnecessary compliance costs. Against that burden, we see no benefit to consumers. BusinessNZ submits that government should maintain the status quo. There is no evidence that New Zealand's regulation of market power is broken; so there is no case to fix it. In addition, we see no need to introduce market studies or the centralisation of such studies.

1. Background

In our submission to the NZPC in February 2014[1], we outlined our thoughts on the need or otherwise for a review of s36. As both the NZPC's 2nd interim report and the Issues Paper state, the NZPC provided three recommendations on section 36 (s36) of the Commerce Act, namely:

[1] http://www.businessnz.org.nz/__data/assets/pdf_file/0004/77575/NZPC-Service-Sector-2nd-Interim-Report.pdf

R4.1 The Government should review section 36 of the Commerce Act 1986 to assess how best to improve its accuracy in identifying situations where firms take advantage of market power for anti-competitive purposes.

R4.2 Any review of competition law on the misuse of market power should note the future review of competition policy in Australia to achieve a consistent approach that mirrors best practice and furthers the goal of a single trans-Tasman economic market.

R4.3 The Government should consider a reform of section 36 to achieve either:

- *a more flexible approach where courts do not rely on a single counterfactual test for an abuse of monopoly power, regardless of the case; or*

- *more of an "effects" approach that aims to minimise the economic costs of decision errors and in simpler cases uses appropriate guidance material and mechanisms for quick decisions to mitigate uncertainty.*

While we believed the NZPC had done a worthwhile job in outlining potential issues arising from s36, we had concerns as to these pre-emptive recommendations for the section's reform.

We stated that a review of s36 should be as wide as possible. In no particular order, it should include:

- Taking into account the historical context - why s36 is in its current form - as well as the fundamental issue of scale and approach in examining New Zealand's competition legislation against that of other countries;

- Ensuring that potential amendments will not have a chilling effect on the legitimate commercial activities of large New Zealand companies, nor will prop up inefficient new entrants into a market; and

- Analysing the cost and commercial uncertainty resulting from Commission investigations (which often take a number of years to reach a conclusion).

In addition, as we will mention below in greater detail, we believed recommendation 4.2 of the NZPC Issues Paper could potentially fall into the trap of simply replicating Australian law without examining both the problem and the solution from a New Zealand perspective. As the Report pointed out: *"the Australian federal Government is planning a 'root and branch' review of its competition law"*. Therefore, one could argue that any review of s36 should begin after the Australian review is completed, so that we have a better understanding of any trans-Tasman implications.

Also, we were conscious of the fact that the size of the New Zealand economy compared with that of the many countries we typically compare ourselves with might, on balance, justify taking a different stance to various aspects of competition law. While the Report mentioned this issue on page 73, stating: *"the review needs to acknowledge the small size of and limited competition in the New Zealand economy"*, we did not think it was given sufficient weighting in the discussion at that time.

Overall, we pointed out that government has to be very sure not to penalise the New Zealand economy unnecessarily by reason of its scale.

Overall concerns with the MBIE issues paper

We accept many of the initial statements in the opening sections of the Issues Paper, particularly in relation to the role of competition and how best to understand its worth to society. BusinessNZ takes the view that overall, New Zealand has a strong competition law framework but that there are always areas in which improvements could be made to enhance efficiency and reduce cost.

An additional statement BusinessNZ believes is also worth quoting in examining issues of competition relevant to a small and isolated country such as New Zealand is that: *"competition is not a numbers game, and the number of competitors alone says little about the intensity of competition between them"*. In this light, an overriding difficulty with the Issues Paper is that it finds itself trapped into concentrating on New Zealand competition cases rather than asking more fundamental questions about problem definition and more importantly, the significance of the problems identified. Ensuring these issues are properly examined is paramount; an examination of misuse of market power could be considered one of the most challenging areas of competition law.

On the point above, we believe it is imperative that MBIE look at these matters through a global lens, rather than one where only domestic players present. Even though New Zealand is geographically one of the most isolated countries in the world, our open trade policies and swift technological uptake have meant goods and services from anywhere in the world are now available for New Zealanders to purchase, which in turn has meant greater competition amongst businesses. While we accept that not all items can be purchased offshore, an ever-increasing percentage can be.

In addition, it is important for MBIE to understand that while the long-term interest of consumers is paramount; this is best served by competition policy that supports innovation and productivity, creating increased choice and quality at competitive prices. Any kind of short-term focus might create immediate benefits for consumers but at the cost of business investment in new products and services, making a loss for consumers and the wider economy the potential long-term outcome.

Back to basics – problem definition and significance

In an increasing number of submissions to Government, BusinessNZ has found itself outlining the core approach to be taken when examining a policy issue. In the current instance this is something we need to reiterate, given the fundamental importance of deciding on the exact nature of the problem and whether any change is required.

Before opting for a regulatory approach, the nature of the problem should first be fully understood, namely who is affected, the cost of taking action and who will bear that

cost. Regulatory intervention, because of its cost, should generally be a last resort, engaged in only when all other cost-effective approaches have been exhausted. In order to justify government intervention, there must be a clear case of market failure and the market failure problem must be significant.

Given that markets are generally faster at self-correcting than governments are at intervening, the onus must be on government to be certain that the benefits of intervention will exceed the cost, including any unintended cost associated with regulation (such as non-compliance).

Regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because regulators do not bear the costs associated with their decisions (costs will ultimately fall on consumers), they may well over-regulate rather than take into account or adequately consider, the cost/quality trade-offs consumers are willing to make.

BusinessNZ is disappointed that too often papers and discussion documents start off on the wrong foot by not asking the fundamental question "is there a problem?" before considering any change to regulatory practices. We would go further, asking policymakers to consider some related questions, including but not limited to:

- Is there a problem *in New Zealand* with the current law (i.e. are there significant issues of "market failure" which need to be addressed)?
- If there is a problem, is the problem significant?
- What are the costs and benefits (including unintended costs) of any proposed changes outlined in the document?
- Are there options for improving outcomes which do not impose significant cost (e.g. by educating market participants)?

As we intend to discuss, the Issues Paper canvasses various issues and provides a fair degree of information on where New Zealand's legislation currently stands, but unfortunately does little to address the key points above.

Pathway for review - no decision forward (but implied)

BusinessNZ takes the view that in most cases after initial discussions are held on a topic that government believes might need to be addressed, conducting a review of a specific provision is best done by first releasing an issues paper on the subject. This assists in garnering the public's view on aspects of the review, and helps formulate options to be canvassed in a subsequent options paper.

Reading the Issues Paper in its entirety, however, tends to indicate a government view that a future options paper is a *faît accompli*. On the one hand, it is useful to

know MBIE's initial thinking on the topic and where it is believed changes are needed. Indeed, page 12 of the Issues Paper states: *"the Issues Paper is designed to test whether further investigation – in the form of an Options Paper – is appropriate, in respect of any of the matters within scope"*. However, the strong implication that there will be an options paper even though the views of submitters have not yet been collated and analysed undermines the Paper's purpose.

An Issues Paper's primary purpose is to gauge the public view and make regulatory changes taking that view into account, first deciding whether or not an options paper will be required. For instance, if the vast majority of submitters consider s36 is working in its current form, then realistically, how much weight would this carry in future decision-making?

Weak link to the Business Growth Agenda

It is important to point out that this review has taken place within the context of the Government's Business Growth Agenda (BGA), which, as the Minister states in his press release, aims: *"to make the New Zealand economy more competitive and productive while protecting consumers and encouraging innovation"*.

BusinessNZ agrees it is important to get the right balance between a competitive/productive economy and ensuring consumer interests are protected. However, we are perplexed to find this issue arising in the context of the BGA. We consider the BGA is being used more as a stalking horse providing for a targeted review rather than as a framework requiring a review.

From our perspective, a BGA policy initiative within the BGA should be there only if it involves a high chance that subsequent changes will enhance New Zealand's productivity and growth, not stifle it.

A chilling effect on competition

As we outlined in our submission to the NZPC, BusinessNZ is particularly concerned that potential amendments would have a chilling effect on the legitimate commercial activities of New Zealand companies, or would prop up inefficient new market entrants. Competition law should not unduly impede legitimate business decision making but instead recognise the commercial dynamics and constraints at work in markets. An amendment that is neither required nor welcomed will stifle business activities, increase compliance costs and severely restrict commercial flexibility.

Furthermore, recognition of the potential for chilling effects on competition should mean a very high threshold for regulatory intervention, especially when the intervention is looking to displace market practice. From BusinessNZ's perspective, the process by which a business entity decides to conduct themselves in the market should attract as little regulatory intervention as possible. Any attempt to create regulatory roadblocks should be crystal clear about the justification for any such move.

While in places the Issues Paper touches on the potential chilling effects issue, from our point of view the issue does not appear to be front of mind often enough; it should be a core issue revisited throughout the Paper. At the very least, it needs to be more evident in any potential future discussion/issues papers on the topic.

Recommendation: That any subsequent issues papers (if required) ensure that 'potential chilling effects on business' are given stronger prominence in discussion.

Chapters 2-4 of the Issues Paper

While BusinessNZ believes that MBIE has done a useful job in addressing issues arising from s36 of the Commerce Act, the Issues Paper does not deal with some of the fundamental reasons why changes might need to be made. The following outlines some of our primary concerns with chapters 2-4.

2. Anti-Competitive Exclusionary Conduct

The Harper Review

In various parts of Chapter 2 of the Issues Paper, Australia's Harper Review is mentioned, particularly in sections 2.1 and 2.2, providing context around anti-competitive exclusionary conduct and benchmarking approaches to such conduct.

Given our comments to the NZPC, we note that MBIE has decided to consider the Harper Review, in stating that: *"because of the similarities that exist between New Zealand and Australian competition policy, the Ministry considers it appropriate, in framing this Issues Paper, to consider the submissions to, and recommendations of, the Harper Review".* Furthermore, if the Australian Government releases its official response to the Harper Review during the consultation period for the New Zealand Issues Paper, this will also be considered.

From BusinessNZ's perspective, we do not believe this is the best course of action to take. MBIE should have waited until after the Harper Review has been completed so that all parties involved have a better understanding of any trans-Tasman implications. While the main considerations of the Harper Review have some bearing on the Issues Paper, and on any possible future options paper, they still leave many views unknown. This could have implications for any end regulatory recommendations.

We would also point out that while BusinessNZ supports moves that lead to closer economic relations between the two countries, we have always taken the view that any form of harmonisation should occur only if there is a clear net economic benefit to New Zealand. More broadly, we increasingly consider that the debate around trans-Tasman harmonisation has become far too simplistic in regard to regulatory change. As a consequence there has been a tendency to overlook some fundamental differences when endeavouring to decide what factors should or should

not be considered for harmonisation. The government push towards harmonisation is often viewed as an end in itself, an overwhelming reason for change. This view, however, overlooks subtle differences affecting the need for regulatory change.

We add, too, that Australia does not always get it right. Take, for example, Australia's approach to separating joint ventures from the per se ban on cartel behaviour. Many Australian lawyers and commentators observe that New Zealand's proposed "collaborative activity" exemption is much more workable and understandable then the overly prescriptive joint-venture provisions in the Australian Competition and Consumer Act 2010.

Assessment of the New Zealand Regime

The current New Zealand regime

As the Issues Paper notes, New Zealand adopted a purpose-based approach to its prohibition of anti-competitive exclusionary conduct which at the time was aligned with the equivalent Australian provisions on misuse of market power. This approach focused on the firm as its goal or objective, or in other words it was to the firm that its attention was directed.

Framework for assessment - consideration of New Zealand's small and remote economy

The Issues Paper points out that framing an appropriate prohibition on anti-competitive exclusionary conduct within the context of New Zealand's small and remote economy is a debatable issue. BusinessNZ agrees. One argument put forward in the Issues Paper is that: *"powerful firms should be subject to stricter rules than abroad, due to "a weaker tendency of markets to self-correct because of higher entry barriers, and consumers having fewer choices".* But this statement is countered by the Issues Paper argument that powerful firms should be allowed some leeway to enable them to act the same way as similar competitors abroad. We would note that one way to ensure New Zealand consumers have fewer choices is to introduce stricter rules. If a small and remote country like New Zealand were seen as a place in which rules for the largest players in an industry were more stringent than anywhere else, this would be detrimental to our ability to present the country as one where businesses are welcome.

Overall view of the New Zealand regime

Page 31 of the Issues Paper sums up MBIE's preliminary conclusion on s36, namely that it is unsatisfactory for three primary reasons, since it appears:

- to be failing to maximise the long-term benefit of consumers, by failing to punish anticompetitive conduct by powerful firms;
- to be too complex to allow for cost-effective and timely application; and

- to be misaligned with other prohibitions in the Commerce Act (sections 27 and 47 both of which include an "effects test" while section 36 relies on a "purpose test") and with equivalent provisions in a number of foreign jurisdictions (the US, the EU and Canada do not require a powerful firm to "take advantage" of its market power).

Overall, we fundamentally disagree with the conclusions reached in the Issues Paper and find them unsatisfactory for the following reasons:

A risk or an actual failure of the long-term benefit for consumers?

Section 2.5.1 of the Issues Paper states that in relation to the question whether s36, as applied by the courts, effectively assures the long-term benefit of consumers: *"In our preliminary opinion, there is a risk that it will not"*. The reasoning behind this is linked to the "safe harbour", court-derived counterfactual test, including an examination of type 1 and type 2 errors, which makes this a blunt, "binary" test.

First, BusinessNZ is perplexed by this preliminary opinion. To start with, there are levels of risk in almost all matters, some significant and some not. In the context of regulatory settings, every piece of regulation carries the risk of not meeting its objective or leading to unintended consequences. Any legislative change decision should be predicated on the fact that there is a clearly-defined and significant problem resulting from the regulation discussed. To state that after close to 30 years there is a risk the legislation in question will not effectively assure consumers' long-term benefit makes almost no sense, especially when there is scant evidence to back up the claim.

Also, page 28 of the Issues Paper states that the "safe harbour" counterfactual test is a blunt "binary" test, because: *'the courts have not considered whether the efficiencies the defendant is seeking to achieve through its conduct could be achieved in a way that had fewer or less harmful anti-competitive effects'*. From BusinessNZ's point of view, such a consideration by any business entity is simply irrational. When deciding on the preferred course of action, a company will consider various options, and choose the one it is believed will maximise efficiency and returns. Whether the chosen course of action will lead to the expected outcome is simply impossible to say. Moreover, knowing a miscalculation could lead to charges, asking a company to accurately assess which future option would strike the right balance between enhancing efficiency and ensuring fewer harmful anti-competitive effects, would be nigh on impossible. It would also move the regime from what MBIE considers a "blunt, binary test" to one so complex and fluid that it would undoubtedly create a chilling effect on business activity.

The evidence for change – complexity at the heart of the problem?

The Issues Paper asks whether s36 is simple enough to be cost-efficient and timely, as well as sufficiently predictable for large firms considering market conduct. MBIE takes the view that while the section scores well on relatively simplicity of application

and purpose: *"the requirement of 'taking advantage' of market power has led to complex and lengthy argument, particularly as a result of the court-originated counterfactual test"*. The problem as stated in the Issues Paper is around *"the cost and delay involved in making a case under the counterfactual test, whereby the evidential burden for the plaintiff of proving a hypothetical counterfactual is simply too heavy in many cases"*. This has led MBIE to take the view that: *"the prohibition has ultimately become defendant-friendly"*.

While it is encouraging to see a focus on trying to define the actual problem, again, there is little or no discussion of actual New Zealand cases where the prohibition has indeed become "defendant-friendly". Given the Issues Paper's tone and the need for change the Paper outlines, BusinessNZ would have thought MBIE would have provided a number of examples from the 50 or so cases where subsequent defendant actions and/or behaviour might have appeared to call into question the court decision. In other words, the fact that a defendant was found not to have breached the Act was to the detriment of long-run competition for New Zealand consumers. The time frames examined would certainly provide ample scope for this. But that there has been no such discussion (particularly in an Issues Paper which should lay the ground work for setting out a case for change) is evidence that any reason for change would be hard to justify.

Furthermore, changing to a different type of test, like the 'effects test' discussed below, it will not necessarily reduce costs or evidential burden. Instead, it might simply transfer the cost and burden to the defendant, thus creating a substitute effect, and therefore not simplifying the law as intended.

Moreover, it could equally be stated that a lack of cases in which anti-competitor behaviour has been found might be an indicator of minimal problems with the current s36, not to mention showing the correctness of court decisions from the perspective of long-run competition.

Misalignment with other provisions

Appendix A of the Issues Paper outlines both Commerce Commission cases and private enforcement proceedings relating to s36 since the Act was passed, which, as mentioned, comes to around 50 cases. Section 2.4.3.1 raises the question of whether it may be desirable for s36 to align with other competitive law provisions in overseas jurisdictions, given alignment would reduce the costs of compliance and enforcement by allowing New Zealand courts and firms to draw on a larger body of knowledge and skills in interpreting the law. However, the Issues Paper also points out that while New Zealand currently produces few court decisions under s36, changing the law would not automatically mean there would be (nearly) as many decisions as in larger jurisdictions.

The Issues Paper notes that alignment with the laws of major trading partners would also be desirable to facilitate cross-border trade and investment. This would be particularly so with Australia if it meant third party investors felt assured they faced

few extra competition law risks should Australian operations encompass New Zealand.

As stated above in our section on the Harper Review, we have previously outlined concerns with international harmonisation as a leading reason for introducing criminal sanctions. BusinessNZ has repeatedly commented on this argument when used in other regulatory areas, namely to the effect that any harmonisation needs to show a clear net economic benefit for New Zealand. Also, we remain particularly suspicious of the ongoing need simply to duplicate business law on both sides of the Tasman. In many instances this makes intuitive sense but that should not mean such alignment is simply accepted without due consideration.

While BusinessNZ believes we should be cognisant of offshore laws and regulations to ensure domestic economic growth is maximised, this type of justification is unsatisfactory for two primary reasons. First, as the Issues Paper rightly points out, having New Zealand legislation based on overseas rules means we are at the whim of any subsequent changes offshore. Furthermore, simply placing offshore laws in a New Zealand context without taking into account the country's legal system overall could be very problematic. European commercial law for instance, typically takes a stronger regulatory approach than does commercial law in New Zealand.

Second, BusinessNZ struggles to understand why there is a fundamental problem with a lack of court decisions in this country and why this should predicate the need to align with offshore jurisdictions. Putting aside the fact that as a small country would obviously have fewer court cases than other countries we typically compare ourselves with, what does having fewer court cases actually mean? While MBIE has taken the view that this for all intents and purposes indicates means s36 is not working for New Zealand, it could also mean that in fact there are very few cases to answer as the prevalence of those warranting change is minimal.

We are also concerned that international alignment is often viewed as an end in itself, rather than as an element of a broader range of considerations which can improve the quality of regulation in New Zealand. S36 has been in existence since 1986, and is well understood by the major players in the local market. While we would not argue that potential change should be curtailed simply because of what the existing players are used to, it does mean that any changes should at least provide close to the same level of understanding, in addition to ensuring the quality of regulation has been improved.

Potential Options for Reform

Given the Issues Paper takes the initial view that reform is required, focus is then directed to possible reform options. Therefore, BusinessNZ would like to make some comments on aspects of these options.

An effects test

Table 3 of the Issues Paper succinctly outlines MBIE's thinking on possible options for s36, ranging from no reform (the status quo) through to both removing the taking advantage requirement and adding an effects test.

BusinesNZ would like to make two points regarding an effects test. First, we would like to point out that New Zealand (and Australia) already has that test for unilateral exclusionary conduct. Section 27 of the Commerce Act captures anti-competitive exclusive dealing arrangements, predatory buying, predatory pricing and non-price predation via product tying and bundling practices. The Commerce Commission acknowledges that s27 can be invoked against many, if not all, types of alleged market power abuse. Entirely unilateral conduct, such as refusing access to network infrastructure by a vertically integrated dominant firm, is extremely rare.

Secondly, effects analysis is inherently uncertain for business. We wish to point out that in the case of *Telecom v Clear* the Privy Council emphasized that all traders are entitled to know in advance whether their business behavior will break the law or not. The difficulty with effects analysis it that it can be hard for a firm to predict the impact of proposed conduct before it embarks on any given initiative. Furthermore, all business firms are ultimately locked in a struggle to eliminate their rivals. That is competition. In market economies, every seller wants what other sellers are seeking at the same time, namely sales, profit, and market share. The marketplace struggle creates an enduring contest where only efficient firms survive by offering the best practicable combination of price, quality, and service to the benefit of consumers. Businesses all hope that their sales strategies will have the effect of damaging their rivals' ability to compete. In that environment, how are business people expected to make confident real-time decisions where the law roundly prohibits trade practices with anti-competitive effect? This will create significant uncertainty around what effects will be illegal and what will not.

In addition, as mentioned above, New Zealand's small and remote economy means it is dominated by a number of large firms in particular sectors. That reality in itself is not a bad thing, but simply a natural outcome of the country's economic landscape. Indeed, some companies have found the competitive requirements offshore too higher threshold to overcome or that economies of scale can be achieved in New Zealand only by scaling up operations. Also, it is worth pointing out that many large firms in New Zealand now regularly find themselves competing with much larger firms internationally, particularly internet retailers. With New Zealand continuing to head down the path of more free trade agreements, leading to increased competition here, maintaining market share will undoubtedly require greater activity, not less.

Therefore, given the points raised above, we believe an effects test will chill entrepreneurship as business will fear that competition on the merits could be misconstrued (or misrepresented) as anti-competitive conduct.
Also, page 33 outlines some "out of the box"' options to be considered, such as reversing the burden of proof for some of the elements of the prohibition, or limiting

liability to reasonably foreseeable anti-competitive effects. In light of our primary views, any attempt to introduce such extreme options would be roundly rejected by the business community. The case for change full stop is less than compelling and looking at options radically different from the status quo would do nothing to improve matters.

Furthermore, it would be fair to say that a consistent and satisfactory approach to an effects test has yet to be developed anywhere in the world. New Zealand is typically somewhere where different markets are dominated by a few large firms. An effects test here would essentially create a test case environment in which the worst outcomes of such a regime might well be experienced.

Link between simplicity and an effects test

BusinessNZ agrees with the general thrust of section 2.4.2 on the issue of simplicity, in that any system that perfectly assures consumers' long-term benefit would highly likely be complex. The complexity of any new system would need to be considered to ensure it was cost-efficient, timely and predictable.

However, the link between simplicity and the introduction of an effects test is tenuous at best. The Issues Paper points out that the current regime involves a high degree of complexity prohibiting cost-effective and timely applications and implies an effects test would introduce a high degree of simplicity to consumers' long-term benefit. However, we would argue that an effects test is not necessarily less complex, but just involve different complexities. Furthermore, an effects test might provide an easier pathway to prosecution (in light of the discussion above), but this does not mean it would create a more competitive environment. In short, we believe that simplifying the ability to prosecute could impose long-term costs on consumers.

Primary recommendation – s36

On balance, BusinessNZ believes a significant threshold is required to reach the conclusion that the current s36 does not meet the long-term benefit of consumers. After analysing the arguments put forward in the Paper, BusinessNZ does not believe that MBIE has provided a worthwhile case for change, and that the current regime is sufficient. Therefore, taking into account all points discussed above, BusinessNZ has concluded there is insufficient evidence to warrant further work on changes to s36.

Primary Recommendation: That as s36 of the Commerce Act already assures consumers' long-term benefit, an options paper on the section should not proceed.

Additional points to note - ensuring a Draft Bill in the process

Notwithstanding our primary recommendation above, if a majority of submitters overall is of the view that a change to s36 is required, leading to an options paper

and a change in legislation, BusinessNZ strongly encourages MBIE to release a Draft Bill for consultation.

Since it is unlikely that the business community would support change, BusinessNZ believes a further consultative step between an options paper and a Bill introduced into Parliament would be an appropriate step. Although it could be argued that any issues with the Bill could be addressed at the Select Committee stage, we have increasingly seen instances of a disconnection between the recommended options in discussion documents and the Bills that follow.

At the very least, the release of a draft bill for consultation would help mitigate some of the unintended outcomes possible as a consequence of initial draft government legislation.

Recommendation: That if required, MBIE looks to go through a full consultation process that includes the release of a draft Bill for feedback.

3. Alternative Enforcement Mechanisms

Chapter 3 of the Issues Paper deals with New Zealand's alternative enforcement mechanisms, namely settlements and the cease and desist regime. MBIE's preliminary conclusion is that these Commerce Act mechanisms, particularly the latter, are not operating satisfactorily and therefore reform is required.
From BusinessNZ's perspective, of the Issues Paper's proposals for change those in the chapters dealing with alternative enforcement mechanisms are the least controversial in terms of potential chilling effects on the business community. Therefore, our comments are focused more on the potential effects of the changes outlined in chapters two and four. However, this does not mean that changes to current settings have no potential for adverse outcomes.

Table 5 on page 48 does a good job of summarising possible future options. However, to make a call currently about which option would work best is in many respects to put the cart before the horse. If, after submissions have been analysed, the Government decides to retain the s36 status quo, any changes to the alternative enforcement mechanisms could be quite different from what they would be were s36 itself to be significantly changed. Therefore, we believe alternative enforcement mechanisms should not be considered until MBIE has a clearer view of what other changes are likely to be made following its targeted review of the Commerce Act.

Recommendation: That MBIE should suspend its views on alternative enforcement mechanisms until there is a clearer view as to what associated changes are likely following this targeted review of the Commerce Act.

4. Market Studies

BusinessNZ believes the Issues Paper does a good job of outlining the current situation with market studies in New Zealand. As with our initial observations on

competition law, we take the view that by international standards, New Zealand's regulators in general perform their task well.

Obviously, given its existing powers, the Commerce Commission is most deeply involved in the discussion but section 4.4.2 provides a useful outline of the other areas of government where market studies are carried out. Indeed, the opening line of the relevant chapter points to this when it states: *"it would be inaccurate to say that market studies cannot be conducted in New Zealand"*. We would go one step further and say there are currently more than sufficient opportunities in New Zealand for market studies to occur.

A targeted review by way of the New Zealand Productivity Commission

In view of the Issues Paper's origins, we would point out that it is somewhat ironic to ask about the need for a single, broad power to investigate any market from a competitive perspective.

As outlined in section 1.4 of the Issues Paper, this targeted review of the Commerce Act essentially came about following the NZPC's Services Sector report in 2014 – an example of how a report into an area of competition can be organically generated without the need for some centralised structure.

Defining the market studies problem

Much as with the issue of whether there is a need to change s36, we are again perplexed, after reading the discussion on market studies, as to the actual problem. From our perspective, that there is no single, broad power to investigate market competitiveness of markets issues neither advantages nor disadvantages New Zealand. The key question is whether not having a single power is somehow creating a <u>significant problem</u> for New Zealand's competition environment.

On page 51, the Issues Paper examines the suggestion increasingly made in overseas reviews, that an agency separate from the competition enforcement agency and dedicated solely to competition advocacy, including market studies should be established. It goes on to point out that: *"there is a view that empowering a competition agency to undertake market studies with a possible recommendatory power may compromise the agency's appearance as an impartial enforcer of competition law"*. It is then acknowledged that: *"Although there are forms of market studies that may be undertaken in New Zealand, 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"*. BusinessNZ would staunchly oppose the establishment of a single agency with a broad power to investigate any market from a competition perspective.

Market studies = ongoing cost and regulation

In section 4.5.1 the Issues Paper discusses diagnosing market conditions, stating that: *"A new possible outcome of a market study is a recommendation for regulatory change"*. We see little in room in the history of prior market studies in New Zealand to suggest otherwise. Any government agency tasked with conducting a market study will invariably be tempted to include some form of recommended regulatory change, given the inconsistent and often haphazard way in which regulation has been developed in New Zealand over time.

Also, centralising a market studies' requirement would not only mean requiring yearly studies to justify public sector staff and resources but the likelihood of certain sectors being investigated for the sake of it and others reinvestigated within a relatively short timeframe. We have only to look at regulatory investigations in New Zealand's telecommunications sector to see that in many cases an ongoing investigatory pattern would develop when in all likelihood no investigation was needed.

BusinessNZ believes there is little or no evidence suggesting the need for a single, broad power to investigate any market from a competition perspective and recommend improvements and considers no such agency be established.

Primary Recommendation: That no agency be established that has a single, broad power to investigate any market from a competition perspective and make recommendations for improvements.

Looking ahead

Notwithstanding our primary recommendation on the market studies issue, if other submitters broadly supported a market studies power, we do not believe the Commerce Commission would be the best organisation in which to place a relevant agency. When it comes to undertaking proper policy processes and ensuring market studies are based on a roots and branch view, we believe it would be best for any such agency to be located within the New Zealand Productivity Commission. Often, market studies need to be put into the context of the wider New Zealand economy, something we believe the NZPC has a good track record of doing since it was established in 2011.

Indeed, this point is made on page 56, where MBIE states that in relation to possible Commerce Commission conflict of interest concerns: *"another body such as the Productivity Commission could take on the role of advocating for pro-competition regulatory change through market studies"*. Unfortunately, this statement is somewhat undone by the following sentence: *"However, it is unclear whether here is a need for greater evidence-based competition advocacy by another public body"*. From BusinessNZ's perspective, no one government department should be the sole clearing house for all competition advocacy. While the Commerce Commission takes up the bulk of the work in key areas of competition policy, other departments with

specialised knowledge in certain areas have also investigated competition issues in New Zealand and should not be precluded from doing so.

Given that compared with the Commerce Commission the NZPC is smaller in terms of staff and general resources, we would expect its resources to be bolstered to ensure any market study undertaken could be carried out in a comprehensive manner. Indeed, bolstering resources at the NZPC is something we have advocated for some time, given the critical and wide ranging issues they deal with.

Recommendation: Notwithstanding our primary recommendation, if some form of market studies power is introduced, the relevant agency should reside within the New Zealand Productivity Commission and not the Commerce Commission.

Building an evidence base as a precursor to enforcement

Last, in addition to the points above, pages 56 and 57 of the Issues Paper explain how overseas agencies, particularly the European Commission, are able to verify their suspicion that market participants are engaging in anti-competitive behaviour. The example of the European Commission exercising its mandatory information-gathering powers by way of dawn raids on businesses has drawn criticism. Even without specific evidence of wrongdoing, surprise inspections are considered warranted in the market study context.

The Issues Paper rightly points out that giving the Commerce Commission similar authority would significantly extend its powers. Currently, the Commerce Commission must have a reasonable basis for believing there might be undiscovered facts that would indicate a contravention.

The Issues Paper states that this kind of extension to the Commerce Commission's powers would "unlikely be helpful". From BusinessNZ's point of view that is putting it mildly. If one of the primary aims of amending s36 is to ensure there is no chilling effect on the legitimate commercial activities of large New Zealand companies, or if the effect would be to prop up inefficient new entrants into a market, giving the Commerce Commission or indeed any government department such mandatory powers would most likely chill legitimate commercial activities to the bone. We cannot emphasis enough the problems such a change would cause, ranging from excessive regulatory powers not founded on any degree of necessity, through to significant reputational risk and loss of goodwill between the public and the business community. In short, any movement of this kind would produce a strong and swift reaction from the business community as a whole.

Recommendation: That mandatory information-gathering powers are not introduced.

Thank you for the opportunity to comment, and we look forward to further discussions.

Kind regards,