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Ministry of Business, Innovation & Employment
Competition & Consumer Policy
PO Box 1473
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To whom it may concern

Meredith Connell submission on *Targeted Review of Commerce Act 1986 Issues Paper*

1 Introduction

1.1 Meredith Connell welcomes the opportunity to comment on the Ministry of Business, Innovation & Employment's (**MBIE**) Targeted Review of the Commerce Act 1986 Issues Paper.

1.2 Meredith Connell is regularly instructed by the Commerce Commission (**Commission**) to act on Competition and Consumer Law matters, in particular large and complex proceedings brought under sections 27 and 30 of the Commerce Act 1986 for anti-competitive behaviour. However, we note that our views set out below do not necessarily reflect those of the Commission.

1.3 This submission has been put together principally by Leo Farmer, Kim Francis, and Jacob Barry of our office, who all have experience acting in proceedings brought under the Commerce Act.

1.4 The issues paper identified 46 different questions for comment. We have not sought to answer each and every question, but provide brief comment on the questions that we consider we are best-placed to assist in MBIE's review, based on our experience in Commerce Act cases. Our comments focus on:

(a) the criteria for conducting a section 36 review;

(b) whether section 36, as it currently stands, is too complex;

(c) the options to be considered for reform;

(d) the current settlements regime; and

(e) the ineffectiveness of the cease and desist regime.

2 Questions 7 & 8: Has the Ministry identified the right criteria for assessing the adequacy of section 36 and should they be given equal weight?

2.1 In setting the criteria to use in assessing the operation of section 36, MBIE has considered the following:

(a) the long-term benefit of consumers within New Zealand (as mandated by section 1A of the Commerce Act);

(b) simplicity;

(c) alignment with other provisions under the Commerce Act; and

(d) consideration of New Zealand's small and remote economy.

2.2 We consider that the stated purpose of the Commerce Act, to promote competition in markets for the long-term benefit of consumers within New Zealand, must prevail. That must be the start and end point for any section 36 reform.

2.3 Of course having a provision that is also simple and is consistent with the other provisions of the statute is desirable. But it does not help to have a simple regime, that aligns with the other anti-competitive provisions in the Commerce Act, but that does not achieve its purpose.

2.4 Keeping in mind the stated purpose, the key criteria for reforming section 36 must be factors that are focused on screening out pro-competitive conduct, but which captures anti-competitive conduct. Reform which starts with that as its focal point, can then turn to issues of simplicity and alignment with other provisions of the Commerce Act.

2.5 A final note on the relevance of simplicity to this reform process. The reality is that section 36 is a provision which, at its core, is targeted at large businesses who exercise their power in such a way that it carries with it the potential for consumers to suffer significant detriment. It is not targeted at firms without a significant market share.

2.6 The reality is that the businesses at whom section 36 is targeted are well-versed in this area of the law, and have the resources to ensure they comply. Issues of whether conduct is sufficiently anti-competitive are inherently complex legal and economic issues, and attempts to achieve simplicity may cause more problems than they solve.

2.7 Instead, to the extent that simplicity has relevance in the drafting process, the consideration should be "workability"; ensuring that businesses are aware of the law, its boundaries, and implications; that the Commission has an incentive to take cases under section 36 where it considers there has been anti-competitive behaviour infringing the spirit of the provision; and to ensure that the courts have clear direction as to how the provision is to be interpreted.

3 Question 11: Do you agree that section 36 – as applied by the courts – is too complex to ensure that it is cost-effective and timely?

3.1 The Commission has frankly admitted that it has little appetite to take cases under section 36. That speaks volumes about whether section 36, in its current form, is satisfactory.

3.2 The main proponents of section 36 remaining in its current form argue that it provides certainty for businesses, which is important for the economy. That position currently provides them certainty that there is little chance of them ever being caught by the provision.

3.3 Our view is that there is no issue with the complexity of section 36 – it is no more, and in fact arguably less, complex than equivalent provisions in overseas jurisdictions. The issue is that section 36 has been interpreted too narrowly (in that the courts have held that only the counterfactual test can be used to determine whether there has been a taking advantage of) and in many cases the counterfactual test will be very difficult to apply or unworkable. This makes it nigh on impossible to prove a case under section 36.

3.4 To illustrate this point, it is valuable to consider the comparative EU provisions. The equivalent to section 36 (Art 102 TFEU) does not use a counterfactual test, but instead focuses on the harmful effect of the behaviour, balancing all of the relevant circumstances to the case at hand. In many cases this will be a more complex assessment than the counterfactual test.

3.5 It is these issues with the counterfactual test that result in the Commission, faced with limited resources to effectively enforce the Commerce Act, having little incentive to take a gamble on a section 36 case compared to, say, section 27 and 30 cases which, in general, have significantly greater prospects of success.

3.6 A further consideration is that Commerce Act cases are inherently expensive and time consuming. Few cases go the distance. Many result in settlement after proceedings have been filed. The most recent example of a Commission case that went some way to completion was the Air Cargo proceedings, which spanned more than five years from the commencement of the proceeding until final settlements. That excludes the time taken during the initial investigation. A High Court hearing on the question of jurisdiction alone took five weeks, coupled with numerous other interlocutory matters occupying time in the courts.

3.7 While Air Cargo was a section 27 via section 30 case, we consider a typical section 36 case will inevitably be subject to the same or similar delays, expense and complexity by dint of the litigation process. It is unrealistic to set out to achieve section 36 reform which results in a new provision that enables low-cost and time-efficient proceedings to be conducted. That belies the reality of litigation, particularly in this area of the law which, because of its nature, is technical and complex.

3.8 To conclude on this point, we do not agree that section 36 is too complex to ensure that it is cost-effective and timely. Instead, the provision is too narrow, which prevents meritorious cases being brought. The issues of cost-effectiveness and timeliness need to be put in the context that proceedings of this nature are not small in scale.

4 Questions 18 and 19: Which of the potential options for reform would you like to see discussed (and not discussed) if the Ministry publishes an options paper?

4.1 As discussed, our view is that section 36 reform, in whatever form it ultimately takes shape, needs to provide the correct incentive to the Commission to take cases under the section. It needs to be easier for the Commission to prove a section 36 case, else section 36 does not deter the conduct it is intended to capture. Relaxing the counterfactual requirement is an obvious improvement to be made in this regard.

4.2 However, opponents will say that relaxing the counterfactual requirement will inevitably lead to uncertainty faced by businesses about the types of legitimate business conduct that can be undertaken. It is therefore important that any options paper considers how an authorisations process would usefully complement a more relaxed section 36 test, to alleviate any genuine concerns about the creation of uncertainty.

4.3 We also consider that the question of whether an authorisations system is appropriate or not is part and parcel of the consideration of how efficiency gains are treated under section 36 (whether taken into account as part of the section 36 test or as a separate defence). How and at what part of the process efficiency gains should be taken into account needs to be assessed and stated clearly as part of section 36 reform.

5 Question 27: Do you agree that the current settlements regime has a number of weaknesses?

5.1 A central part of the Ministry's consideration of alternative enforcement mechanisms is that standard enforcement proceedings brought by the Commission have high costs and long delays associated with them.

5.2 We consider that the Ministry's paper does not fully consider the benefits, flexibility, and results of the Commission's settlement regime over the past decade or so.

5.3 First, the Ministry's paper focuses on "out of court" settlements. In relation to anti-competitive conduct, settlements in cases where the Commission considers that it has sufficient evidence to bring proceedings almost always result in "in-court" settlements. In the cited examples at paragraph 3.5.1.1, it is likely that all of those cases stemmed from full investigations where Court proceedings were contemplated.

5.4 Therefore, when assessing the Commission's settlements regime, a full assessment of the Commission's settlement tools should be taken into account.

5.5 The process of in-court settlements for cartel behaviour generally takes the following course:

(a) The Commission files civil proceedings in the High Court for breaches of section 27 and/or section 27 via section 30 of the Commerce Act.

(b) If a settlement is reached, it is usually reached on the basis of admissions of liability under one or both of the above provisions, and an agreement between the parties to submit an agreed penalty to the Court for approval.

(c) The party making the admission then does so in Court, and the parties proceed to a pecuniary penalty hearing where the parties seek approval of the agreed penalty. The Court must consider whether the proposed penalty is within the appropriate range and, if so, impose the penalty on the defendant(s).

5.6 In the more than 20 penalty decisions where this settlement process has taken place over the last eight years, we are unaware of a time where the Court has departed from a penalty that had been negotiated and agreed between the parties.

5.7 We disagree with the Ministry's criticisms of the settlements regime. Of course, the settlements are contractual in nature. However, the pecuniary penalty regime is an effective regime for deterring and penalising breaches of the Commerce Act, as demonstrated by the number of cases where it has been imposed over the last decade. It also strikes an appropriate balance between recognising the Commission's discretion to determine the appropriate regulatory response to a breach, but together with an appropriate level of court supervision. To alleviate the risk of settlement agreements being breached (the occurrence of which, to our knowledge, has been rare, if at all) empowering the Commission with the ability to seek enforceable undertakings (as it can under the Fair Trading Act), would complement the existing settlements regime.

6 Question 28: Do you agree that the cease and desist regime has proven ineffective?

6.1 Yes. The cease and desist regime offers no obvious advantage over an interim injunction in terms of speed and efficiency. An ex parte injunction could be obtained more quickly than a cease and desist order. In addition, many cases in the Commerce Act context are likely to end up in court anyway, because the stakes tend to be high.

6.2 Other factors that favour the use of the interim injunction procedure are that the Court process offers advantages in terms of greater general deterrence, and precedent and guidance for the

future. There is also no provision for the Commission to appeal a cease and desist order, which is likely to make it an unattractive proposition to the Commission.

6.3 The regime also has a number of uncertainties which may deter its use, when compared with an interim injunction. There is an awkward relationship between the cease and desist regime and any subsequent penalty proceedings. It seems odd that a cease and desist order would remain in place if the High Court determines after a trial that there was no breach (ie, the prima facie case is not made out). But there is no ability to revisit cease and desist orders.

6.4 The cease and desist Commissioners appointed also do not have to be individuals with specific competition expertise, and they do not sit with lay members (as the High Court can in Commerce Act cases). This increases the onus on parties to file expert evidence and detailed submissions, which could slow the process down.

6.5 Perhaps more fundamentally, the fact that no cease and desist orders are being sought suggests that there may be no need for a cease and desist regime. Commerce Act issues seldom arise in a way which requires the Commission to urgently obtain relief. As soon as conduct is the subject of investigation by the Commission, parties tend to change their conduct to minimise risk. If litigation is imminent, agreement can usually be obtained to suspend the offending behaviour.

6.6 In summary, there is simply no evidence that there is an ongoing need for a cease and desist regime. In fact, it is questionable whether there ever was.

7 Conclusion

7.1 We are grateful for the opportunity to make a submission on the Ministry's *Targeted Commerce Act Review Issues Paper*, and trust the Ministry finds it of assistance. Should you want to discuss any aspect of this submission further, please do not hesitate to contact us.

Yours faithfully
Meredith Connell