BusinessNZ
The voice of business

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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: Cross-Submission Process: Targeted Review of the Commerce Act 1986

I am writing in response to the Commerce Commission's (ComCom) follow-up letter to the Minister commenting on the original 39 submissions to the Ministry of Business, Innovation & Employment (MBIE) Issues Paper, *Targeted Review of the Commerce Act 1986* (referred to as 'the Issues Paper').

The ComCom letter set out reasons why it believed those against the changes to s36 outlined in the Issues Paper were incorrect. BusinessNZ would like to respond to specific points and also to elaborate on certain points made by the majority of submitters who were against the proposed changes to s36.

Opening and concluding comments

We agree with one of the ComCom letter's opening statements that *"we want to ensure that you have the information necessary to make a well informed decision that promotes the best long terms interests of New Zealand consumers"*. However, contrary to the ComCom view, we believe the business community has provided a great deal of information necessary to make a well informed decision on the proposed changes to s36. The business community's views reflect both a broad economic and legal perspective, which is the approach this letter will also take.

BusinessNZ questions the concluding comments in the ComCom letter that *"we acknowledge that the issue of reforming s36 is controversial. The divided opinions on the Issues Paper illustrate this"*. Most submissions were against the proposed s36 changes which focus on an extreme solution when the case for change is not strong.

The usual suspects?

Paragraph two of the ComCom letter states that in relation to those submitters not supporting a change to s36, *"Perhaps unsurprisingly, those resistant to reform are large business and the advisors that represent them".* BusinessNZ is concerned

about this statement for a number of reasons. First, our organisation represents a large number of businesses throughout the country of every shape and size, some 70,000+ entities ranging from sole traders and SMEs through to large businesses.

Second, while very few submissions were from small businesses, there were a number of submissions from industry associations, representing a wide cross-section of the business community (from small to large businesses) generally opposed to the s36 change. In addition, we understand a number of regional and industry associations will also be submitting on the cross-submission process, moving us even further away from the argument that this is simply a case of large businesses looking after themselves.

Third, it should be recognised that large businesses are more likely to respond to the Issues Paper as they will probably have the expertise, resources and time necessary to make a response and because what is proposed will result in a prohibition applying particularly to large businesses. Their core objection is to the suggestion that the connection between a business's market power and the conduct to be prohibited should be abandoned (i.e. by removing the "taking advantage" limb). This could see large businesses at risk, even where they have not used their (alleged) market power.

Larger businesses consider it poor policy-making to have laws that treat different classes of persons/businesses differently. There needs to be a link between the attributes that might see harm more likely to occur and the harm that does occur. The change would make New Zealand an outlier internationally as efficiency/business rationale defences overseas guard against the risk of different laws for different businesses. Australia provides a good example of the problems that can arise when different competition laws apply to different types of businesses. There, recent and controversial price signalling prohibitions are already subject to reform.

Last, large business concerns, centring on three primary factors, also affect the wider community:

- There is little or no evidence that s36 has been unsatisfactory for New Zealand consumers,

- Very little consideration has been given to the effect on business investment/behaviour a change to s36 will likely have, and

- The preferred replacement scheme (an ‘effects test’ for unilateral conduct) is an extreme solution for New Zealand, again likely to depress business activity. The proposed s36 changes will make it exponentially more difficult for large New Zealand companies to compete internationally.

Implications of advocating an extreme solution first

Paragraph nine of the ComCom letter makes the point that *“In short, the submissions disclose a view that there is no problem with the enforcement of s36”*. This view is

again stated in paragraph 12 *"We provide examples merely to counter the claim that there are no issues with s36…".* But BusinessNZ has never suggested that there are no issues whatsoever with s36 and this comment is not particularly helpful to the current discussion.

It is important to keep in mind that much of the business community's difficulty with the proposal to introduce an effects test is essentially the decision to identify and propose an extreme solution early on in the policy process – namely making it a front and centre option in the Issues Paper. This point was touched on in our initial submission and we would want to see it addressed. Instead, the focus has been placed on – and strong support given to - a future effects test. It is hardly surprising that the business community leans towards not wanting change when the option for change is not only extreme but appears to be based on little evidence.

If the process had begun by making the case for change, followed by an attempt to assess how far to move up the regulatory pyramid, the business community would have more readily engaged in considering alternative enforcement mechanisms. However, unfortunately, this is not how the consultation process has proceeded.

In BusinessNZ's view, the assertion that s36 is "not effective" does not appear to be supported by the enforcement record in New Zealand. As noted in the Russell McVeagh submission, cases taken over the past 16 years have resulted in two wins and two losses, including the imposition of the largest ever penalty under the Commerce Act. That does not suggest an "ineffectual" prohibition. Similarly, under the equivalent Australian prohibition (s 46), the ACCC has been successful in 60% of actions over the last 16 years (losing only two cases outright). ComCom supports its argument that s36 is ineffectual by referencing its own enforcement/prosecution decisions, rather than the decisions of the Courts. In seeking to establish whether there is a problem with s36, it would first be better to consider how ComCom has applied the section, before moving on to consider the section itself.

Future chilling effects

In paragraph 14, the ComCom letter states that there is simply no evidence to support the proposition that these extreme reforms will "chill" competitive conduct. This statement cannot be supported given:

a) The abundance of commentary, for example from the International Competition Network, that an effects test "*makes it more difficult for business planners and counsel to predict whether specific conduct is likely to result in an infringement decision. This uncertainty may result in a chilling effect, as firms avoid conduct that may in fact be precompetitive and lawful*";

b) would inevitably create a test case environment;

c) Business should not be criticised for not "attempt[ing] to describe what pro-competitive conduct could not be undertaken with a reformed s36". In the context of a regulator strongly pushing for a new law, no business is going to publicly

highlight specific conduct that could breach that law. Rather, the general point made is that by removing the *link* between the conduct and market power (i.e. by removing the taking advantage limb), even innovative and competitive conduct could be caught by s36 if it has the *effect* of taking sales from competitors (not just the candidates for assessment under s36 such as bundling, deep discounting, exclusivity, input foreclosure etc.).

As outlined in our original submission, knowing a miscalculation could lead to proceedings for multi-million dollar penalties (the Telecom penalty under s36 was $12m, and $25m was sought), asking a company to accurately assess which future option would strike the right balance between enhancing efficiency and reducing harmful anti-competitive effects would be nigh on impossible. It would also move the regime from a "blunt, binary test" to one so complex and fluid that attempting to apply it and the uncertainty of its application, would undoubtedly depress business activity.

One reason a number of submitters focused on the discussion of possible chilling effects was that the Issues Paper paid insufficient regard to this issue. A successful legislative change requires the provision of clear rules for businesses to follow in making business decisions. Clear rules, lacking any element of uncertainty, will avoid what will otherwise be an adverse and chilling effect on pro-competitive conduct.

If government is unsure whether the s36 reform will undermine competitive conduct, a recent example involves the proposed criminalisation of hard-core cartel conduct. After concerns expressed by the business community, government commendably removed the criminal sanctions for cartel behaviour contained in the Commerce (Cartels and Other Matters) Bill noting in its press release that *"in weighing up the benefits of criminalising cartel activity, the Government had to consider the significant risk that cartel criminalisation would have a chilling effect on pro-competitive behaviour between companies."*. We see no difference between that situation and the introduction of an s36 effects test.

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

Kind regards,

Kirk Hope
Chief Executive
BusinessNZ