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Targeted Commerce Act Review  
Competition and Consumer Policy  
Ministry of Business, Innovation & Employment  
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Wellington

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### Targeted review of the Commerce Act 1996

1. This cross-submission is made in response to the Ministry's invitation for comments on any points made in the original submissions on the Ministry's targeted review of the Commerce Act and in the letter from the Commerce Commission to the Minister of Commerce and Consumer Affairs in connection with the original submissions on the review.
2. In this cross-submission, we want to provide the high level perspective of a large business operating in an increasingly competitive environment in response to the comments that we have seen in the various submissions and the Commission's letter.

#### *Section 36*

3. Fonterra supports the need for credible competition law. To be credible and effective, competition law needs to allow all businesses to compete and innovate, and to draw a clear line where competitive behaviour becomes anti-competitive conduct. The challenge is how to draw that line.
4. From our perspective, the key considerations for any reform of section 36 are certainty and compliance costs.
5. Fonterra has found the current section 36 regime to be workable, and it provides business certainty. The current test is clear and it ensures that all businesses – both big and small – can and do compete. To suggest that large businesses have an interest in maintaining the perceived “soft” market power law is not credible. All market participants benefit from clear legal requirements that prohibit abuses of market power.
6. The current regime imposes reasonable and manageable compliance costs.
7. Consumers benefit from the increased productivity and innovation of large businesses. Large businesses should not be prevented from innovating or required to be unnecessarily conservative. They should also not be prevented from competing, or otherwise ‘punished’, simply for their size. It is not surprising that it is the large businesses that are challenging the proposed changes to s 36 when they are most at risk – even if they do not use any market power that they may be perceived to have.
8. Fonterra is legitimately concerned the ‘effects test’ could give rise to uncertainty. It would likely require large businesses like Fonterra (and its advisors) to take a conservative approach, thereby stifling competition, the very thing the Commerce Act is designed to promote.

*Alternative enforcement mechanisms*

9. Fonterra supports reform that would enable effective enforcement in as timely and cost efficient way as possible. Any alternative enforcement regime should include rules to ensure procedural fairness and a right of appeal / review.

*Market studies review*

10. Fonterra submits there are no 'gaps to fill' in relation to the ability to investigate the markets in which Fonterra operates.
11. Under the Dairy Industry Restructuring Act 2001 (DIRA) Fonterra is already subject to an extensive regime that involves oversight, review and investigation (if necessary) of aspects of its business. For example, Fonterra is actively engaged in the Commerce Commission's current review of the state of competition in NZ dairy markets under section 148A of the DIRA.
12. Further, based on our experience in the context of market reviews and investigations, market studies will:
  - be highly disruptive to usual business activities;
  - consume a significant amount of management time; and
  - be costly (to taxpayers, business owners and, ultimately, consumers).

Thank you for the opportunity to cross-submit to the Ministry on its targeted review of the Commerce Act.

Yours sincerely



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