12 July, 2016

Submission to:

Targeted Commerce Act Review: Cross Submissions Consultation

This submission:

This submission of the Building Industry Federation (BIF) on the Targeted Commerce Act Review "Cross Submissions Consultation" is directed at mooted changes to Part II of the Commerce Act, primarily in Section 36 addressing misuse of market power. That provision prohibits a firm with a substantial degree of market power from taking advantage of that power for the purpose of preventing, deterring or excluding competition. Section 36(1) is broadly similar to section 46(1) of the Australian Competition and Consumer Act of 2010.

The BIF believes a change in the Act as suggested would:

- Discourage innovation and enhancement of consumer welfare by introducing additional risks when undertaking pro-competitive conduct;
- Introduce an element of unnecessary confusion in the market place by comparison with the existing situation; and
- Overturn well-established case law supporting a clear definition of a breach of the statute through "taking advantage" of a market power.

We note the views of the Chairman of the Commerce Commission as expressed to the Minister of Commerce, the Hon. Paul Goldsmith. We contend, however, that reform of Section 36 (1) is unnecessary to achieve in the building industry products and materials supply chain a removal of barriers to entry into New Zealand markets and assurance of competitive outcomes.

This is because:

- The New Zealand building supplies market is open to all global players without tariff or quota restrictions
- Competition for sales is intense
- Quality, competitive pricing, innovation and service geared to customer requirements are all prized and premium factors in achieving business profitability in the face of this competition
- A dominant market player purposely taking action to prevent, deter or exclude competition would in these circumstances be easily identified for appropriate action under the existing Section 36(1).

Position on the Commerce Commission view:

We note that the Commission refers to conclusions reached by the Harper Review Panel in Australia concerning proposed changes to Section 46(1) of the Australian Competition and Consumer Act of 2010 – a section broadly similar to Section 36(1) of New Zealand's Commerce Act. The March 2016 Turnbull-led government after initially declining to adopt an effects test, as recommended by the Harper panel, decided following further consideration to accept it but did not implement such a step during its term of office. We think it is important to record that an effects test does not exist in Australia's legislation.

The Commission says that the Winstone Wallboards investigation is a good example where s36 has effectively provided a safe harbour for conduct by large firms without regard to competitive effect. The Commission concluded that a firm without market power was likely to offer loyalty rebates of the type offered by Winstone because loyalty schemes of the type offered by Winstone are common in competitive markets (indeed many of the merchants offered them). And further, that it reached this conclusion by applying the counterfactual test without ever having to examine the impact of the conduct. This example may be regarded as speculative. After all, the commission by applying only the counterfactual test did not have to consider that the company's position in the market had been achieved through high quality product supply and service to customers of a very high and attractive standard.

It is our view, in more detailed response, that it may well have been the "certainty" afforded by Section 36(1) that enabled Winstone to embark on a loyalty scheme. Should it have been placed in a position of having to consider that by taking such a competitive move, which was open to other suppliers, it could be subject to commission action because the effect, if successful, was to reduce the potential sales growth of competitors? The answer in our view is no, because, as found by the Privy Council (in the case of INZCO and New Wool Products Ltd 2004) the dominant market position of a supplier does not rule out reaction in response to a competitive moves by other suppliers seeking to boost their own sales.

An effects test would in this case have introduced an uncertainty and ambiguity along the lines of: "We should do this or we'll lose sales. But if we do so will the Commission come after us because it considers the extent to which we have protected or enhanced our market position is contrary to the new Section 36(1) relating to the effect of our decision".

We agree with the Bell Gully submission (4.11) that an effects test risks calling into question every business decision made by a company with market power. An apparently simple business decision that is pro-competitive or pro-customer aimed at improving product quality and introduction of an innovative solution to a market need would be impacted. This is because the prospect of a resulting increase in sales may well, as a matter of company prudence, become subject to a financial and legal review out of proportion to the objectives. The small scale of New Zealand enterprises by global comparison and the size of New Zealand's markets suggests the introduction of such a requirement is out of proportion to the benefits likely to accrue.

The Commission's paper at paragraph 10 notes that submitters fail to 'describe what pro-competitive conduct they could not undertake with a reformed s 36.' Each situation will be different and turn on the facts.

But in response may we observe the following types of pro-competitive conduct which a new 'effects' test might capture: We speak of, for example, an industry introducing a new product with particular performance characteristics of relevance to New Zealand. Availability of such goods is positive for New Zealand consumer welfare; Other examples may be product bundling which makes logistics to place of sale or use more efficient (i.e. lower cost), or more timely – either of which is of consumer benefit; new packaging types - perhaps of more environmentally friendly disposal, or with dual use, might similarly not be taken to market.

We consider too, that within the above, a key issue is that an enterprise (with a new effects test) is in a difficult position in gauging any pro-competitive work because of the uncertainty. We put the above examples in the nature of 'might' capture. It is not possible to fully particularize those which industry – as the Commission asks - 'could not' engage in.

The Commission's paper refers (Paragraph 9) to a New Zealand Inc. perspective. From this perspective we are acutely aware that the New Zealand market is open to all global suppliers; that competition between imported building products and materials and those of local manufacturers is intense; that those domestic manufacturers with significant market share operate for the most part on a viability need to hold their share. The New Zealand market is more open to imported goods than, we think, any other. Our FTA's are set more open to imports into New Zealand, than our exports to FTA partners.

The Commission observes that *"Business is already exposed to significant risks around how the Commission and the courts will undertake the hypothetical analysis required by the taking advantage test."* That Commission observation regarding the significance of current risk levels reflects the situation even without the mooted changes. We are concerned that the Commission might seek to impose what we would regard as "further risks" upon New Zealand industry beyond those that it considers are already 'significant'.

Characteristics of the New Zealand market are not similar to those of the U.S., Canada or the EU and what might be appropriate in their settings is not necessarily appropriate in New Zealand.

Thank you for the opportunity to make this cross-submission.

Yours sincerely,

Bruce Kohn

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Chief Executive

The New Zealand Building Industry Federation is representative of the supply chain of the New Zealand building industry. Its membership of some 140 companies is drawn from merchants, manufacturers, importers and marketers of building products and materials.