9 February 2016

Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
By email commerceact@mbie.govt.nz

DLA PIPER NEW ZEALAND SUBMISSION ON THE TARGETED REVIEW OF THE COMMERCE ACT 1986 ISSUES PAPER

1 Thank you for the opportunity to make submissions on the Ministry of Business, Innovation & Employment's Targeted Review of the Commerce Act 1986 Issues Paper of November 2015 (**Issues Paper**). Our submission focuses on the section of the Issues Paper dealing with section 36 reform, although we briefly comment on the market studies section.

2 This submission is made on behalf of DLA Piper New Zealand. It does not necessarily represent the views of the firm's clients.

ANTI-COMPETITIVE EXCLUSIONARY CONDUCT

Matters at issue

Has the Ministry accurately described the type of conduct that countries typically seek to prohibit?

3 Yes, the Ministry appears to have accurately described the relevant conduct. However, it is important to note that most of the conduct described would be a breach of section 27 of the Commerce Act 1986 (**Act**) if it had the purpose or effect of substantially lessening competition. Accordingly, these types of conduct are already subject to an effects test. It is principally only predation and refusals to deal that are genuinely unilateral and will be lawful unless prohibited by section 36 of the Act.

Benchmark of approaches to anticompetitive exclusionary conduct

Has the Ministry accurately described the different approaches countries take in their rules against anti-competitive exclusionary conduct?

4 The analysis is technically correct but there are some key questions to be considered, including:

4.1 Whether the different words and approaches in fact lead to different outcomes or is it simply a matter of form over substance; and

4.2 To the extent that there are differences in outcome, are these explained by the different words/approaches or by other underlying differences between jurisdictions? For example, New Zealand should be cautious when looking at the

European position, which creates a special duty on firms with market power to protect the process of competition. This needs to be viewed in the context of general European commercial law which favours regulatory intervention and concepts of fairness/equity, which are not part of a common law landscape.

5 Fundamentally, the task of competition law in this area is to ensure that firms with market power 'do not exclude their competitors by other means than competing on the merits of the products or services they provide.'[1] But, the question is how should regulators and courts distinguish between unlawful conduct (for example, predatory pricing) and lawful competing on the merits (rigorous discounting). This question has not been resolved 100% satisfactorily in any jurisdiction. This is a key point which, in our opinion, needs to be given significant weight in the policy discussion in the context of the New Zealand economy and prevailing market structures.

The New Zealand regime

Has the Ministry accurately described the main elements of New Zealand's rule against anti-competitive exclusionary conduct?

6 Yes, this appears accurate.

In your opinion, what justifications can there be for requiring that a firm with a substantial degree of market power "take advantage" of that power?

7 In our view, 'taking advantage' and the associated requirement for a causal nexus is an essential and useful filter to distinguish unlawful exclusion from rigorous and effective competition. As noted in the Issues Paper, some form of causal connection is standard in most jurisdictions and in our view the 'taking advantage' component appears as good as any on offer. If firms are not using or in some way taking advantage of market power then, in by the far the majority of cases, it is likely they are simply competing on the merits of the applicable good or service or otherwise engaging in legitimate commercial behaviour.

What justifications can there be for a purpose-based (rather than effects based) approach? Why do you think Australia adopted such an approach with its Trade Practices Act 1974?

8 A purpose based approach is logical when dealing with types of conduct where the effect of the conduct is difficult to assess. In our view, there is a key distinction between assessing structured commercial arrangements between parties where there is time and resources to undertake a complex 'with' and 'without' analysis, and a test which should apply to 'one off' exclusionary decisions, which may be made quickly and in an unstructured way. In these latter scenarios, an anti-competitive purpose is a useful filter to attempt to distinguish good conduct from the bad.

Does section 36(1) make sense, given that authorisations do not apply to section 36(2)?

9 Yes, parties who receive an authorisation need to be confident that they then have immunity from challenge under the Act, including under section 36. As noted above, much of the

[1] European Commission *Communication from the Commission - Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* Official Journal of the European Union C 45/7 (24 February 2009)

conduct potentially caught by section 36 of the Act (for example, exclusionary dealing and tying) is also potentially a breach of section 27 and can be authorised.

Framework for assessment

Has the Ministry identified the right criteria for assessing the adequacy of section 36 of the Commerce Act? Should any criteria identified be excluded, or should criteria not mentioned be added?

10 'Certainty of practical application' should be added either as a criteria on its own or given great emphasis under long term benefit of consumers and/or simplicity.

11 It should also be noted that section 36 of the Act applies to both selling and buying products so the criteria needs to be flexible enough to cater for both scenarios. For example, placing a special duty on a party buying a product to preserve competition would need very careful consideration.

12 Another criteria that should be considered is 'fit' with New Zealand market structures (which tend to be more concentrated than markets overseas).

Should the criteria used be given equal weight?

13 Ultimately, the options need to be assessed against the criteria and be carefully scrutinised in light of evidence of costs and benefits. Assessing in the abstract how the criteria should be applied and weighted appears unlikely to be helpful.

Assessment of the New Zealand regime

Do you agree that section 36 may not effectively assure the long-term benefit of consumers? If you agree, are there any sectors of the economy where you consider this to be well illustrated? If you disagree, please explain why.

14 We disagree, as in most cases section 36 provides a useful framework for advising clients with market power of the line between lawful conduct and unlawful behaviour. In our experience, provided a party has a legitimate commercial purpose and is acting in a way that is consistent with how firms act in competitive markets, the conduct is unlikely to be problematic from a competition perspective. Equally, as an adviser we see examples of proposed conduct which is problematic and clearly caught by section 36 due to the clear causal connection between market power and the relevant conduct.

15 A useful example is the *Safeway* decision of the Federal Court of Australia.[2] It is clearly undesirable and unlawful under section 36 for firms to use market power to force suppliers to raise the prices offered to competitors. If an effects test were to be introduced, a detailed analysis would be required to determine (over a 2-3 year period) whether the conduct was likely to have the effect of materially raising prices or reducing quality across the market as a whole.

[2] *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2001] FCA 1861

Is it fair to say that businesses will generally know if they are acting in a way that they would not in a competitive market – i.e. that the current test is sufficiently predictable?

16 This is generally correct in our view. Clearly the very difficult cases are the ones that receive the greatest attention but often they are against a complex backdrop of unusual factual scenarios (for example, the '0867' decision).[3]

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

17 On a day to day basis advising clients on the application of section 36, this has not been our experience. In competition law, cases at the margins will inevitably involve significant time and cost whatever test is applied. For example, there are any number of cases involving sections 27 and 47 of the Act which have been complex, expensive and time consuming.

18 We understand that there has been a sense that several recent cases have extended the counterfactual analysis to a level which has been regarded as overly complex. This may be an issue arising from the facts of those particular cases. Alternatively, we would see this as suggesting (at most) a need for counterfactual analysis to be a helpful tool to assist with causation, as opposed to a very strict technical requirement.

Do you agree that section 36 – as applied by the courts – is not well aligned with other relevant provisions?

19 We believe there are good reasons for applying a different test to true unilateral behaviour, such as predation and refusals to deal. Pricing and dealings are fundamental to commercial conduct with decisions undertaken quickly and on a regular basis. It is not feasible for businesses to undertake the same level of competition analysis in comparison with that undertaken in respect of a structured agreement with a competitor or other market participant.

Given your view on the correct implication of having a small and remote economy, do you consider that section 36 appropriately reflects that implication?

20 Views based on the 'small and remote' nature of the New Zealand economy need to be reviewed constantly in light of changes in technology (for example, online shopping and streaming of content). The 'openness' of and relative ease in which businesses can be established also needs to be taken in account.

21 Generally, section 36 in its current form allows decisions to be made by businesses in a timely way with a degree of certainty as to whether they will or will not breach the law. This benefit could be said to be enhanced in a small economy where transaction costs assume a greater level of importance.

Conclusion

22 In conclusion:

[3] *Commerce Commission v Telecom Corporation of New Zealand Ltd* [2009] NZCA 338

22.1 No test on the table globally for misuse of market power is perfect.

22.2 Section 27 of the Act already captures a wide range of conduct.

22.3 A 'taking advantage' test appears to 'work' for most cases involving potential misuse of market power. *Data tails*[4], *Safeway*[5], the Cease and Desist Order against Northport Limited[6] and *NT Power*[7] are examples of this test working in practice.

22.4 Small competitors without a clear point of difference will inevitably face great difficulty in displacing large incumbents. This will be the case irrespective of the competition test. However, there are a range of examples of entry by new players in concentrated markets which have been successful under the current test.

22.5 It does not seem appropriate for New Zealand to be a guinea pig for an untested and uncertain effects test.

Potential options for reform

23 If an options paper is produced, we would like to see a modified status quo option where the requirement for a taking advantage of market power is retained but it is made clear that the counterfactual test is a factor for the Courts to have regard to when assessing whether there has been a taking advantage. Also, the option of delaying reform until the position has been tested in Australia should be considered.

MARKET STUDIES

24 We are not in favour of the creation of a new statutory body to undertake market studies, or general powers being given to an existing statutory body, for the following reasons:

24.1 There appears to be sufficient scope for effective market studies to be undertaken within the existing regulatory framework. Milk is a useful example for an industry that has been subject to a range of investigations and enquiries.

24.2 There are extensive costs involved for those participating in market studies. There is a risk that the marginal benefit from perceived policy gains from additional market studies will be outweighed by the costs involved.

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[4] *Commerce Commission v Telecom Corporation of New Zealand* (9 October 2009) HC, Auckland, CIV-2004-404-1333

[5] *ACCC v Australian Safeway Stores Pty Ltd (No 2)* [2001] FCA 1861

[6] Commerce Commission, *First ever Cease and Desist Order issued against Northport* (14 August 2006) <http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2006/firsteverceaseanddesistorderissued>

[7] *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90

25 Please do not hesitate to contact us if there are any queries regarding this submission.

Yours sincerely