



10 February 2016

Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
PO Box 1473
WELLINGTON

Email: commerceact@mbie.govt.nz

Dear Sir/Madam

Please find attached the submission that the New Zealand Food & Grocery Council wishes to present on the MBIE issues paper *Targeted Review of the Commerce Act 1986* dated November 2015.

In summary we are in favour of the Commerce Commission having the same legal powers as the ACCC to give it greater ability to address potential future abuses should they arise and to ensure greater trans-Tasman alignment.

Please let me know if you have any questions.

Yours sincerely



Targeted Review of the Commerce Act 1986: Issues Paper

**Submission by the New Zealand Food and
Grocery Council**

10 February 2016

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (**FGC**) welcomes the opportunity to comment on the Ministry's *Targeted Review of the Commerce Act 1986: Issues Paper* of November 2015.
2. The FGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$34 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$28 billion in export revenue from exports to 185 countries – some 61% of total merchandise exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 46% of total manufacturing income and 34% of all manufacturing salaries and wages. Our members directly or indirectly employ 370,000 people – one in five of the workforce.

OVERARCHING COMMENTS

3. The FGC wishes to focus its comments in this submission solely on the supermarket sector. Supermarkets are the main customers of our suppliers.
4. New Zealand has one of the most concentrated supermarket sectors in the world. Supermarkets wield substantial bargaining power over their suppliers. The FGC is concerned that in some instances supermarkets are using their bargaining power in a way that has the potential to harm the viability of a vibrant and competitive supplier market to the detriment of consumers.
5. Given:
 - (a) the fact that there are only, effectively, two supermarket chains in New Zealand;
 - (b) the behaviour exhibited by supermarkets towards suppliers in other parts of the world – where the market concentration is less than New Zealand; and
 - (c) the admissions and allegations by and against the two major supermarket players in Australia (see paras 17-19),

it is not unreasonable to conclude either that such conduct takes place in New Zealand (which goes unreported because of fear of consequences) or that there is fertile ground for such conduct in the future.

6. Supermarket conduct of this nature towards suppliers is against the long-term interests of consumers. Supermarkets' constant demands for lower supplier prices, coupled with supermarkets passing excessive risk and unexpected costs on to their suppliers, means that suppliers have no incentive to invest or to innovate. In the long term, consumers will face higher prices and less choice.
7. Under the status quo, s 36 of the Commerce Act is not operating to address abuses of market power in the supermarket sector. Such abuses by supermarkets have recently been referred to by the Australian Federal Court as "contrary to conscience", and significant penalties of A\$10m have been imposed for that conduct in Australia already against Coles. In those proceedings, the ACCC chose to base its claim on a breach of Australia's unconscionability standard, rather than a breach of the Australian equivalent of s 46. The ACCC has recently initiated proceedings against Woolworths in relation to its treatment of suppliers under this unconscionability standard.
8. The FGC supports a move to an "effects test" and the removal of the "taking advantage" element in s 36, as well as the proposal to grant the Commerce Commission the power

to undertake market studies. The FGC is neutral on the alternative enforcement mechanisms identified in the Issues Paper.

9. However, the FGC is concerned that the proposals put forward by the Ministry in its Issues Paper do not go far enough to address potential abuses of market power in the supermarket sector. In response to Q20 of the Issues Paper, the FGC recommends that the Ministry also considers the introduction of an unconscionability provision and a supermarket code of conduct – both of which exist in other countries, including Australia. This would further harmonise the Trans-Tasman business environment, bring the powers of the Commerce Commission closer to those of the ACCC and provide more certainty for all involved in business trans-Tasman. Giving the Commerce Commission the same legal powers as the ACCC would give the regulator greater powers to address potential future abuses should they arise.
10. These overarching comments are expanded upon below. Answers to relevant questions posed in the Issues Paper are detailed in the attached **Appendix 1**.

SPECIFIC COMMENTS

New Zealand supermarket sector is highly concentrated

11. Around the world, consumers buy the vast majority of their groceries at supermarkets. In most countries the number of large supermarket chains can be counted on one hand. As a result, food suppliers are reliant on sales agreements with a handful of supermarket chains to get their produce into the pantries and onto the tables of consumers.
12. The New Zealand supermarket industry is among the most concentrated in the world. The two supermarket giants, Progressive Enterprises Limited (**PEL**) and Foodstuffs, collectively hold 98% of the supermarket retail market in New Zealand. By comparison:
 - (a) In Australia, Coles and Woolworths hold a combined market share of 70%;¹
 - (b) In the United Kingdom, the top four supermarkets hold a combined market share of 72%;² and
 - (c) In Canada, the top three supermarkets hold a combined market share of 63.4%.³

Supermarket conduct towards suppliers causes concern around the world

13. Because suppliers rely on selling their produce through supermarkets, there is a substantial imbalance of bargaining power between suppliers and supermarkets. Suppliers cannot risk losing a commercial relationship with a supermarket chain, given the high concentration of the supermarket industry in this country. Losing one customer can often be a matter of commercial survival.
14. Supermarkets can and do take advantage of their bargaining power. Supermarket supply chain practices have attracted the attention of competition regulators in New Zealand and internationally.

New Zealand

15. In New Zealand, the FGC has for many years fielded complaints and expressions of concern from its supplier-members about the behaviour of New Zealand supermarkets

1 Roy Morgan Single Source (Australia), April 2006 - March 2015.

2 Market share of grocery stores in Great Britain for the 12 weeks ending October 11th, 2015 <www.statista.com>.

3 Distribution of the supermarket and grocery store industry in Canada from 2010 to 2015, by market share <www.statista.com>.

that goes beyond usual robust business dealings. This behaviour mirrors that experienced in the other jurisdictions referred to in this submission.

Australia

16. In Australia the ACCC has been very active on these matters. It investigated and prosecuted allegations of unconscionable conduct by supermarket giant Coles. The conduct investigated was very similar to the complaints received in the past by the FGC. The Australian investigation led to Coles paying penalties of A\$10 million in 2014 for unconscionable conduct towards its suppliers.⁴ That conduct by Coles included the following:

- (a) Coles implemented an Active Retail Collaboration (ARC) program. When suppliers declined to pay the ARC rebate, Coles threatened that this would impact on Coles' decision about the ranging of the supplier's products; that Coles would not acquire new products from the supplier; that Coles would not provide the supplier with information it had previously been supplied with; and that it risked losing Coles' promotional activity for that supplier's products.
- (b) Coles demanded payments for purported profit gaps where this had not been previously agreed between suppliers and Coles.
- (c) Coles demanded retrospective payments for waste.
- (d) Coles required payment for late delivery where this had not been previously agreed with the supplier.
- (e) Coles imposed penalties for short deliveries of a supplier's product without prior agreement.

17. At the heart of the proceedings against Coles was a finding by the Court that Coles had a substantially stronger bargaining position relative to its suppliers; that Coles did not disclose sufficient information to suppliers; and that Coles exerted undue pressure and unfair tactics on suppliers.⁵ Justice Gordon of the Federal Court noted:

"Coles' misconduct was serious, deliberate and repeated. Coles misused its bargaining power. Its conduct was 'not done in good conscience'. **It was contrary to conscience. Coles treated its suppliers in a manner not consistent with acceptable business and social standards which apply to commercial dealings.** Coles demanded payments from suppliers to which it was not entitled by threatening harm to the suppliers that did not comply with the demand. Coles withheld money from suppliers it had no right to withhold."⁶

"Coles' practices, demands and threats were **deliberate, orchestrated and relentless.**"⁷

"Coles' conduct was of a kind which merits severe penalty. But for Coles making the admissions it has now made and acknowledging the gravity of its contravening conduct, the conduct and circumstances in which it was committed would have warranted imposing penalties at or close to the maximum the law permits".⁸ [emphasis added]

18. In December 2015, the ACCC initiated proceedings against Woolworths for unconscionable conduct towards its suppliers. The ACCC alleges that Woolworths had developed a strategy to increase its profit performance by requiring "Mind the Gap" payments from suppliers.

4 ACCC v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405.

5 See for example ACCC v Coles at [44], [50], [56], [62].

6 At [1].

7 At [201].

8 At [2].

"The ACCC alleges that Woolworths had been seeking to urgently reduce what it anticipated would be a substantial profit shortfall by demanding payments from suppliers in its management-backed "Mind the Gap" programme.

"The ACCC alleges that, in accordance with the Mind the Gap scheme, Woolworths's category managers and buyers contacted a large number of the Tier B suppliers and asked for payments from those suppliers for amounts which included payments that range from A\$4291 to A\$1.4 million to "support" Woolworths.

"Not agreeing to a payment would be seen as not "supporting" Woolworths", the watchdog said in a statement. It claimed that Woolworths sought approximately A\$60.2 million from 821 suppliers through the scheme and ultimately netted A\$18.1 million.

"The ACCC alleges that Woolworth's conduct in requesting the Mind the Gap payments was unconscionable in all the circumstances" [ACCC chairman Rod Sims] said.

"A common concern raised by suppliers relates to arbitrary claims for payments outside of trading terms by major supermarket retailers. It is difficult for suppliers to plan and budget for the operation of their businesses if they are subject to such ad hoc requests".⁹

The ACCC alleges that these requests were made in circumstances where Woolworths had a substantially stronger bargaining position to the suppliers, did not have a pre-existing contractual entitlement to seek the payments and either knew it did not have or was indifferent to whether it had a legitimate basis for requesting a Mind the Gap payment from the targeted suppliers.¹⁰

United Kingdom

19. In the United Kingdom, supermarket conduct towards suppliers has been reviewed in two reports by the Competition Commission, one in 2000 and one in 2008.¹¹ In the 2008 report, the Commission concluded that:

Our review of emails between two grocery retailers (Asda and Tesco) and their suppliers during summer 2007, particularly our observations of their negotiating tactics, give the impression that Asda and Tesco have a strong position when negotiating with their suppliers. ... This may explain, for example, observations such as a supplier providing product at below cost or paying for promotions proposed by a retailer that would otherwise be difficult to explain.¹²

20. Over the course of their investigation, the Commission found that one-third to one-half of suppliers experience practices from supermarkets such as payment delays, excessive payments for customer complaints, and retrospective price adjustments.¹³

21. The Commission found that:

Competition at the retail level leads grocery retailers to seek the best terms and conditions from their suppliers. The possession of buyer power by a grocery retailer allows grocery retailers to extract lower prices from suppliers than would otherwise be the case, and consumers benefit as a result of these lower wholesale prices being reflected in lower retail prices. **However, when, in the hope of gaining a competitive advantage, grocery retailers transfer excessive risks or unexpected costs to their suppliers through practices involving retrospective adjustments to supply agreements or giving rise to moral hazard on the part of the grocery retailer, this is likely to lessen suppliers' incentives to invest in new capacity, products and production processes. If unchecked, these practices, which are essentially a side-effect of competition between grocery retailers with buyer power, will be detrimental to the interests of consumers.**¹⁴ [emphasis added]

9 Food Navigator Asia "Woolworths repeats 'Mind the Gap' demand while drawing heat from ACCC" <www.foodnavigator-asia.com> (16 December 2015).

10 "ACCC takes action against Woolworths for alleged unconscionable conduct towards supermarket suppliers" <www.accc.gov.au> (10 December 2015).

11 Competition Commission *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (2000); Competition Commission *The supply of groceries in the UK market investigation* (30 April 2008).

12 Competition Commission *The supply of groceries in the UK market investigation* at [9.20]

13 At [9.60].

14 At [9.41].

Canada

22. Supermarket conduct towards suppliers came to the attention of the Canadian Competition Bureau in the context of a proposed acquisition. Loblaw, Canada's largest grocery chain, proposed to acquire Shoppers Drug Mart Corporation, Canada's largest drugstore chain. The Bureau took the view that the acquisition would increase Loblaw's market power vis-à-vis suppliers. According to the Bureau, this would lead to a substantial lessening or prevention of competition, higher wholesale prices for other retailers, and potentially higher prices for consumers.

In March 2014 the Competition Bureau reached a Consent Agreement with Loblaw to preserve competition in the market for the retail sale of pharmacy products and drugstore-type merchandise in Canada.¹⁵ The Consent Agreement prohibited certain conduct by Loblaw towards its suppliers that the Bureau considered would reduce competition. This included agreements with suppliers that required suppliers to compensate Loblaw for a pre-determined profit margin; charging penalties related to short deliveries; and charging new supply chain penalties and fees to suppliers that supplied less than \$4 million of products to Loblaw. The Agreement additionally required that Loblaw ensure that supply agreements are provided to suppliers in writing.

Section 36 currently inadequately addresses this conduct

23. Section 36 of the Commerce Act as it currently stands is not working to prevent supply chain practices by supermarkets of the kind referred to above that will have a long-term negative impact on prices and consumer choice. It is no coincidence that the ACCC relied on Australia's unconscionability provisions, and not the Australian equivalent to s 36, when bringing proceedings against Coles and Woolworths.
24. This is primarily because of the "purpose" element of s 36. Supermarkets' key driver is maximising revenue and profit. In the event that a supplier is treated badly, in most cases supermarkets will not have a purpose of restricting entry by individual suppliers, preventing or deterring suppliers from engaging in competitive conduct, or eliminating them. But that does not mean this sort of conduct by supermarkets is appropriate – as the Australian Federal Court has noted, such conduct is still "contrary to conscience".

Section 36, even if amended, will not address this conduct

25. While the FGC believes that amending s 36 so as to remove the "taking advantage" element and to include an effects test will go some way to improving the efficacy of s 36 generally, the FGC does not consider it will address the conduct of concern by supermarkets.
26. Removing the "taking advantage" element on its own will not address these concerns, as the "purpose" element is still problematic as set out above. Nor will the introduction of an effects test provide a panacea. If the supermarkets treat all suppliers in a market equally (badly), there will not likely be a substantial lessening of competition in the market in which these suppliers operate since all suppliers will be impacted similarly.

Supermarket conduct towards suppliers is against the long-term interests of consumers

27. Supermarket conduct towards suppliers as detailed above is detrimental to the long-term interests of consumers.
28. The extra payments demanded by supermarkets, coupled with the supermarkets' drive for ever lower prices, place significant pressure on supplier businesses.¹⁶ If suppliers

15 "Competition Bureau review of the Proposed Acquisition of Shoppers Drug Mart Corporation by Loblaw Companies Limited: Position Statement" <www.competitionbureau.gc.ca>.

16 See Consumers International "The relationship between supermarkets and suppliers: What are the implications for consumers?" (September 2012) at 10.

cannot continue in business as a result, consumers will suffer from less product choice and higher prices in the longer term.¹⁷

29. When excessive risks and unexpected costs are passed from supermarkets to suppliers, suppliers are less likely to invest in new capacity or production or to develop new products.¹⁸
30. In some instances, where supermarkets control the likelihood of a risk eventuating, transferring risk to suppliers creates a "moral hazard": shrinkage, for example, can be reduced by better supermarket security and accounting policies.¹⁹ Passing that risk to the supplier means there is no incentive on the supermarket to minimise that risk. This prevents the development of most efficient practices. Another example of minimising risk might be requiring suppliers to essentially guarantee the margin for the retailer.

The Ministry should consider a broader range of remedies

31. The FGC notes at section 1.2 of the Issues Paper and at Q20 that the Ministry remains open to submissions on the scope of the Issues Paper and other potential options. The FGC submits that the Ministry should consider a broader range of remedies to address the abuse of buyer power by supermarkets – in particular the introduction of an unconscionability provision, and the adoption of a supermarket code of conduct. The FGC also supports a market studies power for the Commerce Commission as already identified in the Issues Paper.

The FGC supports the adoption of an unconscionability standard

32. The FGC supports the introduction of an unconscionability standard as an avenue for addressing conduct that is unfair but that may not be caught within the current and proposed drafting of section 36 of the Commerce Act.
33. In Australia, sections 20-22 of the Australian Consumer Law²⁰ prohibit unconscionable conduct in trade or commerce. Those provisions are provided in the attached **Appendix 2**. Introducing a similar unconscionability standard into New Zealand law would bring us into closer alignment with Australia.
34. The Australian experience has shown that a statutory prohibition on unconscionable conduct is a greatly more effective way to control abuses of market power by supermarkets. It was successfully invoked by the ACCC against Coles and has subsequently been invoked against Woolworths.
35. An unconscionable conduct provision would ensure that those who benefit from an imbalance in bargaining power, would not be able to take advantage of that imbalance in a way that is contrary to conscience. It would provide a legal avenue for redress for suppliers who suffer as a result of such practices.

The FGC supports the adoption of a supermarket code of conduct

36. A supermarket code of conduct would help ensure that supermarkets treat their suppliers fairly. It would be a proactive and holistic approach to abuses of market power in the supermarket sector.

17 At 13 – 14.

18 The UK Competition Commission concluded that investment and innovation by suppliers had been negatively impacted by supermarkets' supply chain practices: Competition Commission *The supply of groceries in the UK market investigation* (30 April 2008) at [9.85]; Consumers International "The relationship between supermarkets and suppliers: What are the implications for consumers?" (September 2012) at 14.

19 Competition Commission *The supply of groceries in the UK market investigation* (30 April 2008) at [9.47].

20 Competition and Consumer Act 2010 (Cth), Schedule 2.

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37. In drafting and implementing a code of conduct, examples of codes of conduct that are already in place include the Australian Food and Grocery Code of Conduct and the United Kingdom's Groceries Supply Code of Practice. Both the Australian and UK Codes:
- (a) Require grocery retailers to deal with suppliers fairly and lawfully;²¹
 - (b) Set out minimum obligations on grocery retailers when varying supply agreements;²²
 - (c) Establish minimum standards of conduct by grocery retailers when dealing with suppliers, such as for payment, de-listing, and allocation of shelf space;²³
 - (d) Require grocery retailers to provide staff training on Code compliance;²⁴ and
 - (e) Set out a dispute resolution mechanism.²⁵
38. The FGC notes that the Australian Code has come under some criticism by suppliers.²⁶ Key criticisms include that it is voluntary; it does not include penalties for breach; it does not include any investigatory powers or the ability for suppliers to make an anonymous complaint; and it allows retailers to ask suppliers to agree to things that would otherwise be prohibited. The ACCC has already expressed concerns that supermarkets in Australia have not been complying with the Code.²⁷
39. In light of this, the FGC submits that the United Kingdom approach to the Supermarket Code is the preferable way to go. Learning from the United Kingdom approach, a New Zealand code of conduct could:
- (a) Apply mandatorily to large supermarkets, as determined by annual turnover;²⁸
 - (b) Require supermarkets to appoint in-house code compliance officers and run code compliance programmes, including an annual compliance audit;²⁹
 - (c) Establish an independent Ombudsman with responsibility for monitoring and enforcing the Code, including powers to receive anonymous complaints and investigate alleged breaches, and to initiate investigations itself to determine whether supermarkets are complying with the Code either generally or in respect of particular grocery items;³⁰ and
 - (d) Introduce penalties imposable by an Ombudsman for breach of the Code, alongside compensation orders.³¹
40. The FGC believes that the establishment of an independent Ombudsman is particularly important. In its 2008 report, the UK Competition Commission recognised that enforcement of the code could not rely on suppliers coming forward with complaints.

21 Food and Grocery Code of Conduct (Aus), para 28; Groceries Supply Code of Conduct (UK), para 2.

22 Food and Grocery Code of Conduct (Aus), para 7-10; Groceries Supply Code of Conduct (UK), para 3.

23 Food and Grocery Code of Conduct (Aus), Part 3; Groceries Supply Code of Conduct (UK), para 5

24 Food and Grocery Code of Conduct (Aus), para 28; The Groceries (Supply Chain Practices) Market Investigation Order 2009 (UK).

25 Food and Grocery Code of Conduct (Aus), Part 5; The Groceries (Supply Chain Practices) Market Investigation Order 2009 (UK).

26 Farm Weekly "Grocery Code faces its critics" (6 March 2015); Business Spectator "Why the ACCC is hounding Coles" (21 October 2014).

27 "ACCC concerned over implementation of the Food and Grocery Code" <www.accc.gov.au> (24 September 2015)

28 See Competition Commission *The supply of groceries in the UK market investigation* (30 April 2008) at [11.276] – [11.290].

29 At [11.322] – [11.328].

30 At [11.332] – [11.376].

31 At [11.370] – [11.371]

Suppliers were not willing to identify themselves to the regulator for fear of consequences for their relationship with supermarkets.³²

41. The same considerations apply in New Zealand. The Ombudsman should be able to receive anonymous complaints, as a form of information-gathering; and should be given powers to enable it to gain access to necessary information from affected parties.

The FGC also supports a market studies power for the Commerce Commission

42. A market studies power would have significant advantages over the current competition law enforcement mechanisms in the supermarket sector. It would allow the Commerce Commission to proactively investigate the supermarket industry (and other industries) when it becomes aware of concerns about practices in that industry.
43. Market studies are a common feature of competition authorities' toolkits internationally.³³ Notably, a number of jurisdictions have undertaken market studies into the grocery retail sector.³⁴
44. The Commission's mandatory investigation powers under s 98 and s 98A should be available to the Commission when conducting market studies. This is particularly important in the supermarket sector, as the imbalance of bargaining power between suppliers and supermarkets means that suppliers are unwilling to bring a complaint to the Commission, or to give evidence to the Commission under a voluntary process. It will also allow the collection of evidence from other parties, such as the supermarkets themselves.
45. The Commission should be given the power to fashion a remedy to address any current or emergent competition concerns, and to that end should be able to make a broad range of recommendations at the end of a market studies investigation. We note, for instance, that at the end of its 2008 investigation into supermarkets the UK Competition Commission recommended a suite of remedies ranging from changes to planning regulations to the implementation of the Groceries Supply Code of Practice.³⁵
46. The Government should be required to respond to any recommendations the Commission makes in the course of undertaking market studies.

32 At [11.350].

33 International Competition Network *Market Studies Project Report* June 2009.

34 In the United Kingdom: Competition Commission *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (2000); Competition Commission *The supply of groceries in the UK market investigation* (30 April 2008).

In the United States: Federal Trade Commission *Slotting Allowances in the Retail Grocery Industry* (1 November 2003).

In Australia: Australian Competition and Consumer Commission *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (July 2008).

In Norway: Nordic Competition Authorities *Nordic Food markets: A Taste for Competition* (November 2005); Norwegian Inquiry Commission for the Power Relations in the Food Supply Chain *The powerful and the powerless in the food supply chain* (April 2011).

In Italy: Competition Authority *Report on the Distribution of Fruit and Vegetables* (June 2007).

In Austria: *Report on Food Distribution Sector* (June 2007).

35 Competition Commission *The supply of groceries in the UK market investigation* (30 April 2008).

APPENDIX 1 – RESPONSES TO SPECIFIC QUESTIONS IN THE ISSUES PAPER

Q20 Are there any other potential options that the Ministry should consider?

1. The Ministry should consider the introduction of a statutory prohibition on unconscionable conduct, as discussed above at [32] to [35].
2. The Ministry should consider the introduction of a compulsory Supermarket Code of Conduct, as discussed above at [36] to [41].

Q45 Do the approaches to market studies described in the Issues Paper align with a gap in New Zealand's institutional settings for promoting competition?

3. As discussed above at [42] to [46], the FGC believes that there is a need for a market studies power as described in the Issues Paper.

Q46 What procedural settings for a market studies power would best fit the identified gap, in terms of:

- a. **Who may initiate a market study;**
 4. The FGC believes that market studies should be able to be initiated by the body conducting the market study (the Commerce Commission), or at the request of the Government.
- b. **Who should conduct market studies;**
 5. Market studies should be conducted by the Commerce Commission. This is consistent with international practice.
- c. **Whether mandatory information-gathering powers would apply;**
 6. As discussed above at [44], the Commission's mandatory information-gathering powers should apply to market studies.
- d. **The nature of recommendations the market studies body could make; and**
 7. The Commission should be given the power to make broad and wide-ranging recommendations, so that the Commission is effectively able to design a remedy to any identified problems. This is discussed above at [45].
- e. **Whether the government should be required to respond.**
 8. The Government should be required to respond to any recommendations made by the Commerce Commission as a result of a market study.

APPENDIX 2 – UNCONSCIONABILITY PROVISIONS IN AUSTRALIAN CONSUMER LAW

20 Unconscionable conduct within the meaning of the unwritten law

- (1) A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

- (2) This section does not apply to conduct that is prohibited by section 21.

21 Unconscionable conduct in connection with goods or services

- (1) A person must not, in trade or commerce, in connection with:
- (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);
- engage in conduct that is, in all the circumstances, unconscionable.

- (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:
- (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
 - (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

- (3) For the purpose of determining whether a person has contravened subsection (1):
- (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
 - (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

- (4) It is the intention of the Parliament that:
- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
 - (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
 - (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - (i) the terms of the contract; and
 - (ii) the manner in which and the extent to which the contract is carried out;and is not limited to consideration of the circumstances relating to formation of the contract.

22 Matters the court may have regard to for the purposes of section 21

- (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **supplier**) has contravened section 21 in connection with the supply or possible supply of goods or services to a person (the **customer**), the court may have regard to:
- (a) the relative strengths of the bargaining positions of the supplier and the customer; and
 - (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and

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- (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
 - (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
 - (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and
 - (i) the extent to which the supplier unreasonably failed to disclose to the customer:
 - (i). any intended conduct of the supplier that might affect the interests of the customer; and
 - (ii). any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
 - (j) if there is a contract between the supplier and the customer for the supply of the goods or services:
 - (i). the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
 - (ii). the terms and conditions of the contract; and
 - (iii). the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
 - (iv). any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
 - (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the customer for the supply of the goods or services; and
 - (l) the extent to which the supplier and the customer acted in good faith.

(2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the **acquirer**) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the **supplier**), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the acquirer and the supplier; and
- (b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
- (c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
- (e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
- (f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and
- (g) the requirements of any applicable industry code; and

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- (h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and
 - (i) the extent to which the acquirer unreasonably failed to disclose to the supplier:
 - (i). any intended conduct of the acquirer that might affect the interests of the supplier; and
 - (ii). any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and
 - (j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:
 - (i). the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and
 - (ii). the terms and conditions of the contract; and
 - (iii). the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and
 - (iv). any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and
 - (k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and
 - (l) the extent to which the acquirer and the supplier acted in good faith.