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

by email: commerceact@mbie.govt.nz

SUBMISSION ON THE TARGETED REVIEW OF THE COMMERCE ACT 1986

1 Orion New Zealand Limited (**Orion**) welcomes the opportunity to comment on the Ministry of Business innovation & Employment's (MBIE's) issues paper "Targeted Review of the Commerce Act 1986" (the **Paper**).

2 The issues paper addresses three issues:

2.1 proposed amendments to section 36 of the Commerce Act

2.2 alternative enforcement mechanisms

2.3 market studies.

3 Our comments focus on section 36 and market studies.

4 We don't have specific comments on MBIE's proposals for alternative enforcement mechanisms, but we support proposals to streamline and achieve more cost-effective enforcement processes.

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Summary of submission

5 We agree with MBIE's proposed criteria for assessing section 36. We note particularly that in order to achieve long-term benefit to consumers, section 36 must not deter firms with market power from pursuing commercial strategies that are consumer-focused and enhance efficiency. It is important to ensure that section 36 is as simple as possible and that it delivers a predictable and pragmatic compliance standard. We think the status quo does that.

6 We are not convinced that MBIE has sufficiently defined the perceived problem with section 36. MBIE doesn't point to any examples of conduct, or cases, where section 36 has failed to adequately address anticompetitive conduct. We think further work is required on this point before MBIE moves to issue an options paper.

7 We also don't think that MBIE's proposed reform options are likely to achieve its criteria. MBIE has understated the complexity associated with moving away from the taking advantage test towards an effects test. Other jurisdictions that apply an effects test have developed their approaches over decades of complex litigation.

8 As regards market studies, we do not think there is gap in the institutional framework that requires the establishment of a market studies power. Between the various roles of the Commerce Commission, MBIE, the Productivity Commission, sector-specific regulators and the Law Commission, there are a range of bodies capable of addressing issues of market function.

9 Were MBIE to take this proposal further, we would be concerned about the prospect for mandatory information gathering and remedial powers to add to the already significant regulatory burden. Absent an unambiguous need for such a power, we think the costs will outweigh the benefits.

Anti-competitive exclusionary conduct

10 The issues paper outlines a number of reform options for section 36, and several criteria against which proposed amendments should be measured. While we generally agree with the paper's criteria:

10.1 we don't think the paper sufficiently explored the perceived problems with the current section 36 in light of those criteria; and

10.2 we don't think that the paper's options improve the status quo (as measured against those criteria), and are unlikely to achieve MBIE's stated objectives.

11 We're not experts on the technical aspects of the paper's options, so our comments focus on the practical implications for businesses.

Criteria against which any reforms should be measured

12 We generally agree with the paper's assessment criteria, subject to the following comments.

Long-term benefit of consumers

13 We agree that the long-term benefit of consumers should be the focus of section 36. As the issues paper notes, that means section 36 should prohibit anti-competitive unilateral conduct by firms with a substantial degree of market power.

14 However (as the paper acknowledges), section 36 needs to ensure that *efficient* conduct by firms with market power is not prohibited, and that firms with market power are not deterred from pursuing commercial strategies that enhance efficiency.

15 Section 36 should therefore recognise that not all conduct that is disadvantageous to the commercial interests of competitors is inefficient or contrary to the interests of consumers. Put another way, imposing constraints on firms with market power to in order to protect the interests of competitors does not necessarily serve consumers if it promotes inefficient entry or requires firms with market power to cross-subsidise inefficient competitors.

16 In practice, this means that an amended section 36 will only maximise the long-term benefit of consumers if it effectively delineates between:

16.1 conduct that impacts on competition in a manner that is inefficient (and which should be prohibited); and

16.2 conduct that superficially impacts on competition because it is disadvantageous to the commercial interests of other market participants, but is not inefficient or contrary to the long-term interests of consumers.

17 The current section 36 achieves this delineation through the 'taking advantage' test, which provides that if a firm without market power would also engage in the conduct, then it is likely to be efficient. An alternative formulation of section 36 would need to achieve this delineation, otherwise section 36 might require dominant firms to hold an umbrella over inefficient competitors.

Simplicity

18 The issues paper states that the application of section 36 should be:

18.1 cost-efficient

18.2 timely; and

18.3 predictable for firms with market power trying to assess the lawfulness of proposed conduct.

19 We support these criteria, especially predictability. Section 36 should enable practical application by firms with market power, and it should drive a culture of compliance via a clear standard for firms to measure their conduct against.

Alignment with sections 27 and 47, and Australia

20 We don't object to alignment as a potential goal, but it's less important than the other criteria discussed above. Alignment is not an end in itself.

21 We don't believe there is intrinsic value in achieving alignment between section 36 and sections 27 and 47. Sections 36, 27 and 47 are directed towards entirely different conduct (unilateral conduct, agreements, and mergers/acquisitions, respectively). Different types of competition concerns arise under each of these headings, and hence there is not necessarily anything to be gained by aligning the tests under these sections.

22 We also don't consider that alignment with Australia is necessarily desirable. Any reform of Australian legislation should be judged on its own merits. Alignment with Australia could result in a sub-optimal outcome for New Zealand, especially given our different wider context.

New Zealand's small and remote economy

23 We believe that MBIE should have regard to:

23.1 New Zealand's wider economic context in order to determine whether a proposed formulation of section 36 is likely to enhance efficiency or whether it is likely to require incumbents to sponsor or cross-subsidise inefficient entry or market practices by other market participants; and

23.2 the extensive regulatory regimes already in place for a number of sectors, which provide an additional avenue for addressing concerns relating to market power (e.g. Part 4 of the Commerce Act and the Telecommunications Act). Those regimes complement the existing formulation of section 36.

Has MBIE identified a problem with the existing formulation of section 36?

24 The issues paper provisionally concludes that the current section 36 doesn't maximise the long-term benefit of consumers because it fails to

adequately identify and punish anticompetitive conduct by firms with market power. However, the paper hasn't:

24.1 identified any examples of problematic unilateral conduct that are not addressed by the current version of section 36;

24.2 pointed to any decided cases that should have been decided differently; or

24.3 explained which categories of exclusionary conduct noted in section 2.1.2 aren't sufficiently addressed by the current section 36.

25 Instead, the paper simply suggests in the abstract that exclusive dealing could be economically rational behaviour under competitive conditions but nonetheless anticompetitive when carried out by a business with market power, and refers to a press statement made by the Chair of the ACCC.[1]

26 It's therefore difficult for us to assess whether the paper raises a valid concern with the current section 36, and it's difficult to engage with that concern in this submission.

27 We believe that it's premature for MBIE to discuss reform options without first exploring the perceived inadequacies of the current regime. We don't think the problem is sufficiently defined to warrant moving to an options paper as the next step.

28 The paper also doesn't appear to consider the fact that section 36 was originally promulgated in a largely deregulated environment. Against a background of deregulation, there was particular reliance on section 36 to constrain market power. However, successive New Zealand governments have since incrementally re-regulated many of the industries where market power tends to exist.

29 As an electricity distribution businesses we are subject to price-quality regulation under Part 4 of the Commerce Act. We are also subject to the oversight of the Electricity Authority, which is responsible for the Electricity Industry Participation Code, distribution pricing principles and dispute settlement, and other matters.

30 Extensive regulation also applies in other strategic infrastructure sectors, including telecommunications, gas pipelines and airports. Part 4 also includes a mechanism to extend regulation to other sectors which face structural barriers to competition.

31 Section 36, in its current form, is therefore part of a package of regulatory tools that address market power issues. Any assessment of the adequacy

[1] At section 2.5.1 of MBIE's paper.

of section 36 needs to take into account the complementary role of regulation. We think that the current framework – utilising both regulatory and competition law – strikes a good balance between the need to avoid deterring innovation and investment by large firms and the need to prevent abuses of market power.

Assessment of MBIE's proposed options

32 The issues paper proposes several options for amending section 36. We're not experts on the technical implications of the options, but we make the following observations.

33 The paper's first option is to retain the status quo. In our view, that has several advantages given the paper's assessment criteria:

33.1 the 'taking advantage' test in the current section 36 distinguishes between presumptively efficient conduct that would be expected under competitive conditions and inefficient abuses of market power. It therefore serves the long-term interests of consumers. The paper suggests it is failing to accomplish that, but that paper provides no specific examples of that failure;

33.2 the current section 36 has been extensively discussed by the courts and a number of categories of abusive conduct have been defined through the case law. It is a relatively well-understood legal test and so, contrary to the paper's view, it is a relatively cost-effective and timely enforcement standard;

33.3 the current section 36 is predictable. It delivers a known compliance standard that can be readily applied by firms with market power to assess commercial conduct. It is more practical to ask, *"is this a proposal that we would pursue absent market power?"* than *"does this proposal substantially lessen competition?"*.

34 The paper propose a number of reform options, including:

34.1 removing the 'taking advantage' requirement from section 36;

34.2 replacing the purpose test with an effects test; or

34.3 some combination of those two options.

35 It's not clear that any of these options will achieve the paper's assessment criteria.

36 The paper doesn't provide any reasons why an effects test would more likely lead to long-term benefits for consumers. The paper refers to equivalent provisions in the EU and the US as support for effects tests.

However, the approaches to abuse of market power in those two jurisdictions differ.

37 EU law is significantly more interventionist than in the US. The same case tried in each of those jurisdictions often gives different results. That demonstrates two points:

37.1 First, a legislative effects test doesn't necessarily tell you what the answer should be in any given case. In the EU and US, the courts, over many decades, have developed the principles of dominance law. Accordingly, legislating for an effects test doesn't represent a concrete policy position. It just delegates the policy-making role to the courts.

37.2 Second, the fact that the EU and US have taken similar legislative provisions in very different directions demonstrates that there is no single accepted solution to what constitutes anticompetitive single firm conduct. It remains a highly contested area of law in all jurisdictions that have some variation of section 36. It is therefore very difficult to assess whether a proposal along the lines of the Harper Review will actually improve on the status quo.

38 We are also concerned that the paper's reform options are unlikely to meet the criterion of simplicity:

38.1 a tangible advantage of the status quo is that it has been extensively litigated and thus elaborated by the courts. Any new test, particularly an effects test, would also have to go through a process of judicial elaboration, which would likely mean protracted and complex litigation. That would be neither cost-efficient nor timely. It is not clear how encouraging new rounds of lengthy and complex litigation is likely to benefit consumers;

38.2 a new test would also, for the same reasons, be highly unpredictable, unless and until a critical body of case law emerges. In the absence of extensive judicial elaboration, a broadly-stated effects test would not deliver a practical compliance standard for firms with market power;

38.3 the paper appears to assume that applying an effects test to unilateral conduct would be straightforward, given that a similar test applies in relation to sections 27 and 47. The EU and US experience suggests that this wouldn't be the case. An examination of the US experience shows that the application of an effects test is dependent on detailed and complex economic analysis, which is not practical in a day-to-day compliance environment.

Conclusion

39 While we broadly agree with the paper's assessment criteria for assessing section 36, we don't believe that the paper has sufficiently defined the problem with the current section 36. Our view is that MBIE should not move forward with an options paper until the problems with the current section 36 have been more clearly defined and backed with evidence.

40 We are not convinced that any of the paper's reform options for section 36 improve on the status quo, as measured by the paper's assessment criteria.

41 We believe that the paper understates the complexity of moving to an effects based test – in the litigation context and in its practical day-to-day compliance application by incumbent firms.

Market studies

42 The paper has asks:

42.1 is there is a gap in the current institutional framework that could be filled with a market studies function; and

42.2 if so, what procedural settings would be most appropriate.

Is there a gap?

43 Our view is that there is not a gap in the current institutional framework. A number of bodies already carry out similar functions:

43.1 the Commerce Commission investigates breaches of competition law under Part 2 of the Commerce Act, and it has regulatory functions under Part 4 of the Commerce Act and the Telecommunications Act. There is the power in Part 4 to inquire into sectors and to impose regulation (which may take a range of forms);

43.2 the Electricity Authority has monitoring, enforcement and policy-development roles in the electricity sector. Other sectors are similarly subject to industry-specific regulatory oversight;

43.3 MBIE has a broad mandate to conduct sectoral inquiries, and is not limited in the scope of issues it can examine;

43.4 the Productivity Commission is periodically tasked by the Government to examine industries or sectors and make recommendations as to whether the laws, regulations, institutions and policies that affect New Zealand's productivity can be improved; and

43.5 the Law Commission has a role in assessing how legislative reform can support policy.

44 These bodies between them have adequate powers, expertise and resources to address the issues that might otherwise be addressed through a market study function.

45 The Productivity Commission has a role that's almost indistinguishable from MBIE's description of a market study. The Productivity Commission has demonstrated that it can consider a broad range of issues relating to market function, including competitiveness. For example, its inquiry into international freight transport services determined that carve-outs from the Commerce Act for shipping were no longer warranted, and it recommended that the shipping industry be made fully subject to competition law.

46 Introducing a further oversight role would merely add to the already substantial regulatory burden on New Zealand businesses. Further proliferation of overlapping responsibilities would likely lead to fragmented policy-making.

Appropriate procedural settings

47 The paper asks respondents to indicate:

47.1 the appropriate body to conduct market power studies and how they should be initiated;

47.2 whether a market study function should include mandatory information gathering powers;

47.3 the nature of the recommendations that might result from a market study; and

47.4 whether Government should be required to respond.

48 We believe that the Productivity Commission is best placed to undertake this kind of study.

49 Market studies undertaken by the Commerce Commission could be perceived as 'fishing expeditions' for the Commission's enforcement and regulatory roles, bypassing the procedural checks and balances that apply to those roles.

50 Consistent with current practice for the Productivity Commission, we believe that market studies should be initiated by Government.

51 We consider that mandatory information gathering powers would be unduly burdensome on regulated businesses that are already subject to

substantial information disclosure requirements through Part 4. Existing requirements place significant administrative burdens and costs on regulated businesses.

52 Mandatory information gathering powers may be warranted where there is a case-specific justification; for example, in the enforcement context. But mandatory information gathering powers for a broad-ranging inquiry where no clear issue has been identified at the outset is disproportionate.

53 We believe that a market studies body should not be able to impose remedies on the market. Such studies should only result in recommendations to Government.

54 We also believe that the Government should not be obliged to respond.

55 Finally, market studies in other jurisdictions indicate that they can be extremely costly exercises – for the public purse and for businesses subject to an inquiry. The example below sets out the administrative timetable from a recent UK market study to illustrate the often protracted nature of such exercises. That suggests that it would only be appropriate to establish a market power study if there was an unambiguous need. We do not think such a need exists in New Zealand.

Example: UK's private healthcare market study timetable

- Mar 2011: Office of Fair Trading (***OFT***) begins market study into private healthcare
- Dec 2011: OFT provisionally decides to refer market study to Competition Commission (***CC***) for investigation
- Apr 2012: OFT refers private healthcare market to CC for detailed market study
- Jun 2012: CC releases statement of issues and calls for submissions
- Jun 2012 – Feb 2013: CC conducts hearings with affected parties
- Feb 2013: CC releases annotated statement of issues and calls for submissions
- Feb 2013 – Aug 2013: CC releases working papers and calls for submissions
- Sep 2013: CC releases provisional findings report and notice of possible remedies and calls for submissions
- Apr 2014: CC releases final report
- Apr 2014 – Oct 2014: CC consults on draft remedy orders
- Oct 2014: CC releases final order

- Jan 2015: Decision remitted after successful appeal to Competition Appeal Tribunal
- May 2016: proposed deadline for publication of final report on remitted issues

Concluding remarks

56 Thank you for the opportunity to make this submission. We do not consider that any part of this submission is confidential. If you have any questions please contact

Yours sincerely