March 04, 2019.

Competition and Consumer Policy
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

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Ref. SUBMISSION REGARDING THE NEW ZEALAND MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT DISCUSSION PAPER "PROTECTING BUSINESSES AND CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES – DECEMBER 2018"

Dear Sirs,

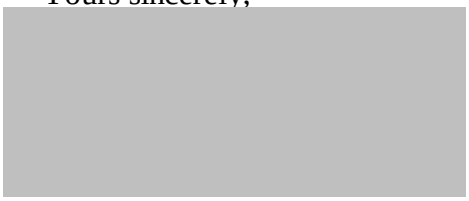
We have pleasure in enclosing a submission that has been prepared by members[1] of the Behavioural Working Group of the Antitrust Committee of the International Bar Association (the "Working Group").

The Working Group is supportive of the initiative to further develop the MBIE's policy under the important topic of whether New Zealand's existing protections against unfair practices need to be strengthened. As indicated in the submission, the Working Group agrees that competition law need not directly address the types of conduct being considered in the discussion paper and that its focus should be on conduct that substantially lessens competition. However, effective competition laws and enforcement ought to indirectly address certain conduct over which extended protection is being considered within the Discussion Paper.

[1] Darren Shiau and Scott Clemens (Allen & Gledhill LLP), and Co-Chairs of the Working Group Andrew Ward (Cuatrecasas) and Chris Charter (Cliffe Dekker Hofmeyr)

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of the Ministry.

Yours sincerely,



Elizabeth Morony / Marc Reysen
Co-Chairs Antitrust Committee

ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION UNILATERAL CONDUCT AND BEHAVIOURAL ISSUES WORKING GROUP SUBMISSION REGARDING THE NEW ZEALAND MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT DISCUSSION PAPER "PROTECTING BUSINESSES AND CONSUMERS FROM UNFAIR COMMERCIAL PRACTICES – DECEMBER 2018"

1 Introduction and Purpose of Submission

1.1 Introduction

The International Bar Association's Unilateral Conduct And Behavioural Issues Working Group (the "Working Group") sets out below its submission on the New Zealand Ministry of Business, Innovation & Employment's ("NZMBIE") Discussion Paper entitled "Protecting business and consumers from Unfair Commercial Practices", dated December 2018 (the "Discussion Paper").

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 80,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative perspective. Further information on the IBA is available at www.ibanet.org.

1.2 Purpose of Submission

The Working Group welcomes the opportunity to comment on a number of aspects of the Discussion Paper. The Working Group is supportive of the

NZMBIE's initiative to consider the important topic of whether New Zealand's existing protections against unfair practices need to be strengthened.

The Working Group's central focus is to provide an international forum for thought leadership with respect to competition / antitrust law developments. While the Discussion Paper considers potential protections against conduct and contractual matters extending beyond that which would ordinarily be controlled by competition laws (as is recognised within the Discussion Paper) any such protections will sit alongside and be complementary to competition laws. In this regard, and to assist in the further consideration of the potential protections being considered, the Working Group has sought to share its perspective on certain points raised in the Discussion Paper.

2 Structure of the proposals

2.1 The role of competition law with regard to fairness

Competition law has its primary objectives tied to the safeguarding of the competitive process, as a means to ensure efficient functioning markets, and the preservation of consumer and total welfare (and its indicative parameters including price, quality, choice and innovation etc.).

The Working Group agrees with the NZMBIE's observations within the Discussion Paper that while fairness is not a primary goal of the New Zealand Commerce Act 1986 (the **"Commerce Act"**), its provisions are relevant in informing the larger discussion related to extending protections against certain conduct that may be considered to be unfair.

Conduct generally targeted by competition laws

The Working Group considers that it would be useful within this submission to clearly identify those areas of conduct that may currently fall within the scope of conventional competition law protection, which in turn ought to further inform the broader discussion.

At the foundational level, competition laws generally seek to provide protections against conduct related to anti-competitive agreements, abuse of dominance (or substantial market power), and mergers that substantially lessen competition. At the more granular level, in respect of the behavioural prohibitions, the types of conduct that generally fall subject to the application of competition laws are conduct that impacts or relates to:

a) **inter-brand competition** – being the ordinary competition that exists between competing suppliers of the same, or substitutable, goods or services;

b) **intra-brand competition** – being the competition that exists between distributors or retailers of the same brand of goods and services;

c) **foreclosure or exclusion of competitors** – being conduct undertaken by dominant entities (or companies holding a significant degree of market power) that foreclose the dominant entity's competitors or potential competitors from being able to compete effectively within a relevant market; and

d) **exploitation** (including the imposition of unfair purchase or selling prices or other unfair trading conditions) – specifically related to unfair pricing and contractual terms imposed by dominant entities (or companies holding a significant degree of market power). However, not all competition laws contain specific prohibitions against such exploitative conduct, including New Zealand as generally understood, and cases related to exploitation are notably rare in competition law jurisprudence.

While conduct such as a price-fixing cartel between rival firms may be considered ipso facto "unfair" to customers by objective standards, the principle concern with such conduct is the impact that this conduct has on inter-brand competition. In other words, competition policy and enforcement are generally not designed or motivated directly by concepts of fairness, save for conduct that may give rise to concerns under paragraph 2.1(d) above. In this regard, fairness may be considered a resultant consequence of sound competition law policy and enforcement, rather than its goal.

Unfairness and exploitation in competition law

In certain jurisdictions, conduct that is exploitative can give rise to abuse of dominance concerns. Notably, Article 102 of the Treaty of the Functioning of the European Union (**"TFEU"**), specifically states that an abuse of dominance may consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". Notwithstanding this, cases involving unfair (or "excessive") prices are rarely pursued (and rarer still are cases involving unfair trading conditions), as it is generally recognised that competition authorities ought to be slow to intervene in commercial

negotiations, where by default firms have the prerogative to determine and negotiate the terms on which they are prepared to deal with counterparties.

In the United States, section 5 of the United States Federal Trade Commission Act declares "unfair methods of competition in or affecting commerce" to be unlawful. While specifically related to methods of competition, rather than unfair conduct generally, it has been commonly observed that the prohibition is inherently nebulous and subjective. This ultimately led to the United States Federal Trade Commission to issue a statement of enforcement principles related to the section in 2015 (**"Enforcement Statement"**), which states in particular that:

"In deciding whether to challenge an act or practice as an unfair method of competition in violation of Section 5 on a standalone basis, the Commission adheres to the following principles:

- *the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;*
- *the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and*
- *the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice."*

The Enforcement Statement has been interpreted as clarifying the prohibition will not extend to conduct that is undertaken in bad faith, fraudulent, or oppressive without any possible relation to competition.[1]

Turning specifically to New Zealand, we understand that the provision equivalent to Article 102 of the TFEU (specifically section 36 of the Commerce Act) would arguably not extend to prohibit practices that are exploitative in nature, but rather would be limited to conduct that has the effect on competition outlined in paragraph 2.4(c) above. The New Zealand Commerce Commission's Fact Sheet on "Taking Advantage of Market Power" does not cite any examples of unfair or exploitative conduct as potentially being

1 https://www.ftc.gov/public-statements/2015/09/smarter-section-5

contrary to the prohibition, and specifically states that high prices are not illegal.[2]

In summary, conduct giving rise to fairness concerns not tied to matters affecting competition (as set out in paragraph 2.1 above) do not appear to be specifically regulated by New Zealand's competition laws, and established competition law regimes generally avoid the extension of competition laws to such concepts.

2.2 Application of competition law to vertical arrangements

The Discussion Paper states at paragraph 32 that:

"…many business concerns about unfair practices relate to practices by their suppliers or customers. While nothing prevents the Commerce Act from applying to practices by a firm towards its suppliers or customers, in practice such 'vertical' arrangements are less likely to be anti-competitive than 'horizontal' arrangements between competitors."

The Working Group considers it is useful to clarify that rather than the Commerce Act being technically applicable to vertical arrangements, it is actively applied to vertical arrangements. In particular, arrangements between suppliers and retailer-customers specifying prices at which retailer customers must resell goods or services, are prohibited under the Commerce Act.

Moreover, conduct that gives rise to concerns under section 36 of the Commerce Act (which prohibits entities from taking advantage of substantial market power), invariably involve conduct and arrangements between entities at different vertical levels. For instance, exclusive dealing arrangements between firms with substantial market power and their customers may foreclose competitors to an extent that contravenes section 36 of the Commerce Act.

With reference to the type of conduct that competition law generally safeguards against, as set out in paragraph 2.1 above, vertical arrangements (and restrictions therein) often give rise to intra-brand competition concerns, and exclusionary conduct concerns – subject to a rule of reason establishing whether competition is substantially lessened.

As such, the Working Group is of the view that vertical arrangements are not less likely to be anti-competitive than horizontal arrangements simply because

[2] https://comcom.govt.nz/__data/assets/pdf_file/0041/89897/Taking-advantage-of-market-power-Fact-sheet-July-2018.pdf

they are vertical, but rather that the types of negative effects regulated by competition law only arise from particular vertical arrangements in specific circumstances – bearing in mind that such vertical restraints are often underpinned by cognizable efficiencies which sets them apart from so-called horizontal restrictions which are more often anti-competitive by object. In addition, restrictions on intra-brand competition typically raise concerns in the absence of the sufficient inter-brand competition.

Notwithstanding the above, the Working Group recognises that contracts or conduct giving rise to concerns not falling within the scope of that outlined in paragraph 2.1 above (i.e., conduct demonstrating bad faith or unconscionability etc.), would not be subject to the Commerce Act, and accordingly the question of whether additional protection is required is apt.

2.3 The indirect role of competition law in ensuring fairness

The Working Group agrees with the observations made at paragraph 52 and 78 of the Discussion Paper – specifically that the prevalence of unfair contract terms and conduct is likely to be mitigated to an extent by competitive forces, in circumstances where businesses are well informed and there are many other suppliers or customers to purchase or sell to.

Directly related to the point above, healthy and effective competition laws and enforcement ought, at least to some extent, to indirectly mitigate the prevalence of the conduct over which extended protection is being considered within the Discussion Paper.

3 Summary of Key Points

The Working Group is grateful for the opportunity to share its views on NZMBIE's Discussion Paper and is supportive of the initiative to consider the important topic of whether New Zealand's existing protections against unfair practices need to be strengthened.

In summary, the Working Group makes the following key observations:

- Competition laws, at their core, should relate to the safeguarding of the competitive process, as a means to ensure efficient functioning markets, and the preservation of consumer and total welfare (and its indicative parameters including price, quality, choice and innovation). The Working Group agrees that competition laws do not directly address the types of conduct to which extended protection is being considered

in the Discussion Paper, but would be complementary to any such protections.

- Behavioural prohibitions in competition law are generally concerned with conduct that prevents, restricts or distorts inter-brand competition, intra-brand competition, and the foreclosure of competitors such that competition is substantially lessened.
- Concepts of exploitation and fairness are sometimes associated with competition laws; however, exploitative conduct does not appear to be prohibited by the relevant prohibitions of the Commerce Act. Fairness is typically viewed as a consequence (rather than a goal) of most established competition law regimes.
- Vertical arrangements can often give rise to anti-competitive concerns, and are equally subject to the Commerce Act where they do. However, vertical arrangements giving rise to concerns unrelated to a substantial restriction in inter-brand competition, intra-brand competition, or foreclosure of competitors are not likely to be subject to competition law.
- Healthy and effective competition laws and enforcement ought, at least to some extent, to indirectly mitigate the prevalence of the conduct over which extended protection is being considered within the Discussion Paper.

4 Response to question 10 of the Discussion Paper issues

The Working Group notes that the specific questions raised in the Discussion Paper request in part for empirical observations and assessments of the discussed conduct and its impact, which are matters on which the Working Group is not positioned to comment. Similarly, the design and any protections for conduct falling outside the scope of competition law are not matters on which the Working Group is best placed to comment.

Notwithstanding the above, the Working Group has included brief general comments to Discussion Paper Question 10 "objectives", below.

Q10: Do you agree with our proposed high-level objectives and criteria for assessing any potential changes to the regulatory framework governing unfair practices? If not, why not?

We understand that the proposed high-level objectives and criteria are five-fold:

a) Criterion 1: Consumers are protected from high levels of detriment and practices which unduly impact on their ability to confidently participate in markets.

b) Criterion 2: Businesses are protected from practices which unduly impact on their ability to confidently participate in markets.

c) Criterion 3: Businesses are not unnecessarily prevented from competing effectively, negotiating firmly, and entering into contracts that reflect their wishes.

d) Criterion 4: The law is predictable for businesses and compliance costs are reasonable.

e) Criterion 5: Consumers and businesses have access to effective redress when things go wrong.

The Working Group is generally supportive of the specified criteria, and note that the criteria are largely aligned with the objectives of most competition law regimes, such that any new protections could work in congruence with the existing competition law regime.

The Working Group is particularly supportive of criterion 3, which is a fundamental cornerstone of effective and efficient functioning competitive markets, and free-market economies. The Working Group considers criterion 3 to be equally important to criterion 1, particularly with regard to the economic freedoms currently enjoyed in New Zealand.[3]

The Working Group is grateful for the opportunity to provide its comment and trusts that the NZMBIE will find it of use.

[3] See: https://object.cato.org/sites/cato.org/files/pubs/efw/efw2017/efw-2017-chapter-1.pdf