Matthews Law
COMPETITION · REGULATION · POLICY · STRATEGY

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Submission on Discussion Paper: Protecting businesses and consumers from unfair commercial practices

Introduction

1. This submission is made by Matthews Law, a specialist competition & regulatory law firm.[1] We thank the Ministry of Business, Innovation & Employment (**MBIE**) for the opportunity to comment on its *Discussion Paper: Protecting businesses and consumers from unfair commercial practices* (**Discussion Paper**).

A review seems timely given international developments

2. At this stage we do not advocate for or against legislative change.

3. However, the review seems timely given the growing international focus on such practices. Over the past two decades several countries and international organisations have examined, and in some cases introduced, measures prohibiting such conduct.

4. For example:

   a. Australian Consumer Law contains a prohibition on unconscionable conduct, and a prohibition on unfair contract terms in (some) business-to-business contracts.

   b. Article 19 of Japan's Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade provides that no business *"shall employ unfair trade practices."*[2] The Japan Fair Trade Commission established a task force on abuses of "superior bargaining position" in 2011.

   c. France and Germany have introduced the concept of abuse of superior bargaining power.[3]

   d. The International Competition Network published a report on abuse of superior bargaining position in 2008.[4]

   e. The OECD also debated, and released, a report on monopsony and buyer power in 2008.[5]

Comments on issues to consider

5. If New Zealand proceeded to adopt any measures proposed in the Discussion Paper, we note:

   a. **We generally favour consistency with Australia:** The Australian Consumer Law already contains measures along the lines of those contemplated in the Discussion Paper. There

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[1] Matthews Law is recognised in leading directories, including Chambers Asia-Pacific (leading firm, and leading individuals – Band 1 & Associates to Watch), GCR 100 (18th edition – "Highly Recommended"), Best Lawyers (Competition & Consumer Law, and Regulatory Practice), Legal 500 (leading firm, and leading individuals – Band 1 and Next Generation Lawyers), and Who's Who Legal (Competition, TMT, and Transport – Aviation). See our website for more information. We have significant international and are actively involved in international competition fora including the International Bar Association, the Inter-Pacific Bar Association and the American Bar Association and have represented New Zealand as a Non-Governmental Advisor at the International Competition Network.

[2] See: https://unctad.org/Sections/ditc_ccpb/docs/ditc_ccpb_ncl_Japan_en.pdf

[3] See: https://dejure.org/gesetze/GWB/20.html (Germany) and https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000005634379&idArticle=LEGIARTI000006231971&dateTexte=&categorieLien=cid (France)

[4] See: https://centrocedec.files.wordpress.com/2015/07/abuse-of-superior-bargaining-position-2008.pdf

[5] See: https://www.oecd.org/daf/competition/44445750.pdf

is considerable benefit in aligning our laws with those of Australia where practicable, including the ability to draw on Australian jurisprudence. Australia and New Zealand's commitment to the Single Economic Market agenda[6] would favour any measures introduced aligning closely with Australia's corresponding measures.[7]

b. **Certainty & "chilling effects":** Clearly any new law should have net benefits. As business advisors we know that law changes can impose considerable costs, but this is true of any law change. These can be reduced with appropriate design and there can be offsetting benefits (eg greater commercial certainty, enhanced competition, appropriate standards). Obvious areas to consider are clarity of drafting, consistency with existing legislation (eg the Fair Trading Act), guidelines from the Commerce Commission (which produces excellent clear guidelines) and, potentially, from consistency with Australia. We would expect any standard imposed to be a "high one" and directed at particularly egregious conduct. For these reasons "chilling effects" may not be a significant concern.

c. **Interplay of potential reform with the Commerce Act:** MBIE has noted there should not be an undue interference in normal commercial contracting. This is a valid point, and the potential harms (at least from a "B2B" perspective) might generally stem from market power issues. On that basis it might be thought that competition law can address the concerns. While possible amendments to section 36[8] may partially address these concerns, they may not be a complete solution to MBIE's concerns. Demand-side market power is a challenging area, and competition law is not directed at addressing broader macroeconomic issues, or practices or arrangements which, in themselves, may not meet the relevant thresholds, but which collectively may have material harm. This may be the reason various jurisdictions have adopted specific measures (as contemplated by MBIE).

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[6] https://www.mfat.govt.nz/en/countries-and-regions/australia/new-zealand-high-commission/single-economic-market/
[7] Submission by principal Andy Matthews and Oliver Meech on the Commerce (Cartels and Other Matters) Amendment Bill, 6 September 2012 https://www.parliament.nz/resource/en-nz/50SCCO_EVI_00DBHOH_BILL11153_1_A275428/1af3a52aa3ff641be55a7f1c8516c3f78a2b9f0a
[8] *Discussion Paper: Review of Section 36 of the Commerce Act and other matters* (https://www.mbie.govt.nz/have-your-say/review-of-section-36-of-the-commerce-act-and-other-matters/). We also intend to submit on this Discussion Paper in due course.