AIR NEW ZEALAND

Competition and Consumer Policy
Ministry of Business, Innovation & Employment

**By email:** competition.policy@mbie.govt.nz

**Discussion Paper: Review of Section 36 of the Commerce Act and other matters**

Thank you for the opportunity to make submissions to the Ministry of Business, Innovation and Employment (**MBIE**) on the *Review of Section 36 of the Commerce Act and other matters: Discussion Paper* (**Discussion Paper**).

Air New Zealand endorses the comments set out in Bell Gully's response to the Discussion Paper.[1] We add some additional comments below, focused on our own experience as a business working within the current legislative framework. This includes dealing with suppliers across a range of markets who are likely to have substantial market power.

## 1. An effects-based test is unworkable for unilateral conduct which involves dynamic, reactive decision making.

Conduct covered by the current effects-based prohibitions (mergers and arrangements with third parties) typically involves structural changes to a market or a series of arrangements over time. In such cases, "competitive effect" can be more readily assessed given the longer timeframe in which these decisions are made. Unilateral conduct which might be covered by section 36 are often made as a direct response to competitive conduct by other market participants. These decisions are made far more frequently than mergers and arrangements with third parties, and often require prompt action such that decision-makers do not have the luxury of detailed consideration.

The forward-looking nature of the current test (ie do my actions have an anticompetitive purpose?) allows a decision-maker to assess purpose before taking action. It is relatively easy to train business decision makers on the hypothetical monopolist test, as it allows them to compare the decision they are making to the decision they would make in a similar, competitive market – often a business will have real life examples of such behaviour. There are also established rules of thumb for determining when common activities such as price and capacity decisions, or refusal to supply, are likely to be inferred to have an anti-competitive purpose. These closely align to current US presumptive rules. This has allowed Air New Zealand to provide clear guidance to the business regarding both Air New Zealand's unilateral conduct and the conduct of other industry participants.

The effect-based test proposed by the Discussion Paper is backward looking, considering the effect of conduct on a market long after the decision to undertake that conduct has been made. It requires its own hypothetical "with or without" test – prior to undertaking unilateral action a decision maker must "compare how the market in the future would look with the agreement in place and compare that to how competitive it would be without the agreement"[2] ie two hypothetical futures.

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[1] Air New Zealand continues to hold the views set out in its submissions of 24 March 2016 and 25 July 2016 on MBIE's *Targeted Review of the Commerce Act 1986.*

[2] Extract from Commerce Commission Fact sheet: https://comcom.govt.nz/__data/assets/pdf_file/0025/90961/Agreements-that-substantially-lessen-competition-Fact-sheet-July-2018.pdf

This is a very uncertain assessment for a business decision-make to undertake in a timely manner. Guidance cannot be taken from the Australian regime (there is no current case law), nor is there any "global standard" – the Discussion Paper acknowledges that the US and EU courts have applied vastly different interpretations to what MBIE describes as tests that "share significant conceptual similarities". The Commerce Act explicitly recognises that effects-based tests are difficult by providing for a clearance and authorisation process; each are lengthy and public processes that are not practical in relation to the activities most commonly covered by section 36 (for example, a price change in response to new entry).

Any effects-based test must encompass something similar to the rebuttable presumptions structure suggested in the Padilla paper highlighted in the Discussion Paper. As MBIE notes, both the US and EU jurisdictions have extensive bodies of case law and guidance, including in some cases detailed rules regarding certain types of conduct, which can be adopted for this purpose.

**2. MBIE should not dismiss the views of businesses on the grounds that they are "large companies"**

We are concerned that the view of businesses who apply the law on a daily basis are not at the forefront of the MBIE consultation process. MBIE states that there were no submissions from "challengers and new entrants" on the predictability of the test. This assumes that "large" companies necessarily hold market power in all markets in which they operate, and that their submissions should be read through this lens.

While Air New Zealand is New Zealand's largest airline, it also competes with significantly larger airlines, and many of our suppliers are monopoly providers (eg airports) and/or large multi-national suppliers with substantial market power (eg engine manufacturers, maintenance suppliers). As such, Air New Zealand has considerable experience of being on both sides of market power investigations. This experience reinforces our view that a pure effects-based test creates uncertainties for both sides of the market power debate. We suspect that most large New Zealand companies who operate internationally have similar experiences, and simply want a clear, workable framework for making business decision. It is therefore not surprising that many large companies have made submissions on previous reviews.

We would welcome the opportunity to discuss any of the above in further detail.

Regards

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