

28 March 2019

Competition and Consumer Policy  
Ministry of Business, Innovation and Employment  
PO Box 1473  
**WELLINGTON**

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**Review of Section 36 of the Commerce Act 1986 and other matters**

Thank you for sending to me the Discussion Paper related to the above-mentioned review.

In February 2016, I made a submission on the Targeted Review of the Commerce Act Issues Paper in which I supported further investigation be made to replace the current wording of s36 of the Act. In that submission I was of the view that the “taking advantage” element of the prohibition had, over the years, turned into a major legal hurdle which impeded bringing investigations and cases that should be brought under s36. My reasons were set out in that submission and I remain of the opinion that s36 needs to be re-cast.

Having read MBIE’s well researched and argued Discussion Paper, I support the proposal, to replace the current test with an SLC based effects test, which will align us with Australia. I also support the “simplified” drafting as set out in paragraph 139 of the Paper and opening up the prospect of making applications for authorisations to provide certainty to large firms that have plans to do something legitimate, that might be interpreted as being anti-competitive. However, I doubt the authorisation option will be used often.

I harbour some doubts as to whether the SLC effects test will capture exclusionary conduct in markets where competition is just emerging or at very low levels. The proposed test could incentivise large firms to “strike early” the moment entry or attempted entry is detected to prevent competition being established. In such situations, it might be very difficult to find and bring evidence up to a balance of probability standard of an SLC because the foundation of that evidence was “removed”, leaving the without scenario a very hypothetical exercise. The current s36 proscribed purposes caught conduct in those situations but the proposal to change the focus away from competitors to the competition process might open up a gap in the prohibition. Whether it will or not will largely depend on how Courts will in the future apply a SLC threshold in markets that lack much in the way of competition, which must arise if a firm has a substantial degree of market power to come with the scope of s36 . I recommend that we wait and see how the revised test is applied before considering whether an adjustment is required.

I do not have views either way on the proposal to remove the Intellectual property exemptions. From a practical point of view, I have had difficulty advising clients on whether or not the exemption applied in any case. This is because the exemption concepts are obscure and there is no court precedent. My advice to clients has tended to be cautious with the aim to comply with s27 and s36 and only look to the exemptions as an “if all else fails” defence.

I look forward to learning the outcome of this important project and please contact me if any clarification is required.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Alan Lear', with a small horizontal line extending to the right.

**Alan Lear**

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