

27 March 2019

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

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

**SUBMISSION on
"Review of section 36 of the Commerce Act and other matters"
Discussion Paper**

1. Introduction

Thank you for the opportunity to make a submission on the "Review of section 36 of the Commerce Act and other matters" discussion paper. This submission is from Consumer NZ, New Zealand's leading consumer organisation. It has an acknowledged and respected reputation for independence and fairness as a provider of impartial and comprehensive consumer information and advice.

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2. General comments and answers to questions in discussion paper

As stated in previous submissions, Consumer NZ supports reform of section 36 of the Commerce Act as we believe it is overly complex and does not effectively assure the long-term benefit of consumers.

We support the introduction of a new provision in the Commerce Act, similar to that adopted in Australia's competition legislation.

We have provided responses to selected questions in the discussion paper below. Our responses relate primarily to section 36.

Question 3 – Do you agree that interconnected bodies corporate should be treated the same as a single firm?

Yes, we agree interconnected bodies corporate should be treated the same as a single firm. Companies should not be able to structure their corporate affairs in such a way that enables them to avoid the application of the prohibition on the misuse of market power.

Question 4 – Do you agree that "a substantial degree of power in a market" is an appropriate threshold for the prohibition?

Yes, we agree this is an appropriate threshold.

Question 7 – Should the prohibition focus on purpose OR effects, purpose AND effects, solely purpose, or solely effects? Please provide reasoning.

We consider the prohibition should focus on purpose OR effects. Including purpose OR effects is broader and more likely to capture anti-competitive behaviour and “promote competition in markets for the long-term benefits of consumers within New Zealand.”

Australian law requires proof of either purpose or effects. We consider it is appropriate to have comparable requirements in New Zealand.

Question 9 – Is a “substantial lessening of competition” the appropriate standard for the prohibition? If not, do you have any alternative suggestions? Does the SLC standard provide enough certainty to assess conduct before it is undertaken?

We consider a “substantial lessening of competition” is the appropriate standard for the prohibition.

Question 14 – Should authorisation be available for unilateral conduct?

Yes, we agree authorisation should be available for unilateral conduct in the same way it is for mergers or agreements.

Question 16 – Do you support our initial proposition?

Yes, for the reasons already stated above, we support the initial proposition.

Question 17 – Do you agree with the rejection of these options as unfeasible?

Yes, we agree minor modification of the current section 36 will not be sufficient. We also agree reliance on section 27 as a suitable alternative is not a feasible option.

Question 18 – Do you agree with our assessment of this option against the criteria? If not, why not?

Yes, we agree with the assessment of the proposed option against the criteria. As mentioned above, we consider this option will better ensure promotion of competition in markets for the long-term benefits of consumers in New Zealand.

Thank you for the opportunity to make a submission on the Discussion Paper. If you require any further information, please do not hesitate to contact me.

Yours sincerely



Sue Chetwin
Chief Executive