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Committee Secretariat
Economic Development, Science and Innovation Committee
Parliament Buildings
Wellington

Emailed to: edsi@parliament.govt.nz

Dear Committee Members,

ICNZ submission on the Commerce Amendment Bill

Thank you for the opportunity to submit on the Commerce Amendment Bill (**the Bill**).

ICNZ represents general insurers and reinsurers that insure about 95 percent of the Aotearoa New Zealand general insurance market, including about a trillion dollars' worth of Aotearoa New Zealand property and liabilities. ICNZ members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, cyber insurance, commercial property, and directors and officers insurance).

Please contact Jane Brown (jane@icnz.org.nz or 04 495 8008) if you have any questions on our submission or require further information.

Submission

ICNZ is supportive of strong and effective competition laws in Aotearoa New Zealand and recognises that they play an essential role in ensuring good outcomes for customers. However, consistent with our response to the 2019 *Review of Section 36 of the Commerce Act and other matter* discussion paper, ICNZ remains unconvinced that amendment to section 36 of the Commerce Act (**the Act**) is necessary and believes that the most appropriate course of action is to defer amendment of the Act until there is an opportunity to learn from the application of Australia's equivalent section 46 effects-based test. The earliest expected decision, a case against the Tasmanian Ports Corporation Pty Ltd by the Australian Competition and Consumer Commission (**ACCC**) was scheduled to go to mediation in early March with a hearing set down for May if resolution could not be reached. To the best of our knowledge, there has not yet been a decision.

We comment further on our concerns with the proposed amendment to section 36 of the Act and other issues with this change below.

The basis for making this change is yet to be substantiated

While ICNZ acknowledges the importance of competition and ensuring that those with market power do not take advantage of that position, we do not believe that a compelling case has been made for

changing the Act. It is also far from clear whether an effects-based test will be the best option for addressing the perceived shortcomings of the current section 36.

While the discussion paper expressed a desire for greater alignment between Aotearoa New Zealand's and Australia's competition law saying that an effects-based test was necessary to bring Aotearoa New Zealand in line with the 'global standard', we take this opportunity to point out that there is not one singular standard. The approaches in both the EU and USA differ from the Australian and proposed Aotearoa New Zealand test. Accordingly, if Aotearoa New Zealand introduces an effects-based test before Australia has released a decision, there will be an absence of directly applicable case law to guide the application of the test here.

For completeness, in considering any change, differences between the Australian and Aotearoa New Zealand markets should also be recognised. The key differentiation is in the size of the economies between the two countries. This means that compared to Australia, there are more markets in Aotearoa New Zealand in which there are businesses that could be suggested to have a substantial degree of market power in one or more markets. As a result, the proposed changes to section 36 are therefore likely to have a broader impact across our economy than in Australia.

The open, uncertain and retrospective nature of the proposed new test is problematic

ICNZ's primary concern with the proposed new section 36 is the uncertainty it will create and its retrospective application.

The open and uncertain nature of the proposed new test has the potential to have a chilling effect on commercial activity. This uncertainty will be exacerbated by the lack of any specific case law in Australia and Aotearoa New Zealand. The potential chilling effect of amending the legislation was recognised by MBIE in both the Departmental Disclosure Statement[1] and Regulatory Impact Statement, [2] as part of its analysis of concerns raised by submitters on the discussion paper. While MBIE argued that any risk of the legislation causing a chilling effect will abate as case law develops, they also acknowledge that it may be a number of years before this occurs.

This is illustrated by the Australian example above, where despite their equivalent legislation coming into force on 6 November 2017, there is yet to be a decision released. The Commerce Commission's ability to grant authorisation, as proposed by clause 19 of the Bill, is unlikely to provide businesses with sufficient comfort in the meantime given the length of time taken to process an authorisation application and the associated cost. Indicative timeframes set out in the Commerce Commission's Authorisations Guidelines suggest that it will take over three months to grant or decline authorisation.[3]

Additionally, as the proposed test includes the effect, as well as likely effect, it will be more difficult for firms to self-assess the legality of their conduct as they will be exposed to the unforeseen and unforeseeable consequences of their actions. The effect of this legislation would be that those covered by it will not know whether their actions will be illegal. They should, under the law, be entitled to

[1] http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2021-9.pdf, pg 8.
[2] https://www.mbie.govt.nz/dmsdocument/11262-impact-statement-review-of-section-36-of-the-commerce-act-and-other-matters-proactiverelease-pdf, pg 2 and pg 24-25. MBIE stated that there was a "genuine risk" that businesses may act overly conservatively due to the risks involved in breaching the legislation.
[3] https://comcom.govt.nz/__data/assets/pdf_file/0018/165123/Draft-revised-Authorisations-Guidelines-9-August-2019.PDF, para 114.

know whether their actions are illegal in advance, a position which is supported by case law.[4] It is not clear whether the courts would attribute some degree of foreseeability of consequences to the proposed test, or whether this would be treated as a strict liability matter (in the sense that a business would be responsible for all anti-competitive consequences of its actions, irrespective of whether these were subsequently or objectively unforeseeable and unintended).

The concepts of "purpose" and "likely effect" in the current provision are both established when conduct is engaged in, as "likely" incorporates the concept of reasonable foreseeability - at that point in time a business with market power can access sufficient information to make an informed assessment as to whether proposed conduct has the purpose or likely effect of substantially lessening competition. In contrast, with respect to conduct that has the "effect" of substantially lessening competition, even with the best expert advice, it would not be possible to ascertain the actual effect until after the conduct has occurred and the effects materialise. The proposed test therefore involves an inherently retrospective assessment. All that businesses practically exposed to this can do is obtain external legal and economic advice as to the likely effect of conduct. However, regardless of this due diligence, businesses would remain exposed in the event of unforeseen and unforeseeable consequences of their actions.

Such analysis can also be costly and time-consuming. As well as being necessary before undertaking certain activities, analysis is also likely to be required when deciding whether to enter into an arrangement, or not to, or in considering responses to competitor activities. Analysis of such scale and frequency would however not fit naturally into the business processes or time available. While MBIE has estimated that there will be a one-off cost of $2.7m in addition to the net present value of ongoing costs to transition to the proposed new test, we believe that the actual financial impact of change would likely be much higher due to businesses trying to gain as much certainty as possible around their conduct. MBIE's analysis also fails to account for the hidden, deadweight costs to the economy and simplistically focuses on the costs of implementation. The impact of this legislation would be to create delays in making responses to market signals as entities pause to assess the potential legal-economic impacts of actions that might lessen competition. Of course, whether such action does lessen competition can only be known for certain *ex-post*. The Bill as worded therefore could stall many responsible actions businesses may take, as the next section outlines.

Insufficient protections for large businesses

In our view, in its current form, proposed section 36 does not provide sufficient protection for large businesses who are acting responsibly, such as in situations where they refuse to supply a downstream competitor for reasons that would equally apply to a smaller business acting rationally. This may, for example, be due to the other party posing a credit risk, failing to observe reasonable contractual obligations, posing a reputational risk, or because they lack sufficient supply capacity or quality.

The new test appears to have been drafted in a way that may capture legitimate business activity or 'false positives'. While MBIE recognises this point,[5] they appear to be relying on the Commerce Commission's discretion not to prosecute in such circumstances, which again is highly undesirable from a certainty perspective and implicitly assumes the proposed legislation could go too far. The Bill

[4] In *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385, the Privy Council stated on page 403 that "section 36 must be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful".

[5] Above n 2, pg 20. Specifically, MBIE said that "Courts and the Commerce Commission are very unlikely to treat pro-competitive conduct (such as price reductions resulting from efficiencies, or new innovations) as anti-competitive, even if they result in competitors exiting the market".

as currently drafted does not explicitly provide for this type of discretion, leading to further uncertainty and the risk of a situation where businesses act more cautiously than perhaps necessary to avoid potential breach of the law, even if it is unlikely that the Commerce Commission would prosecute. It is also unclear from the Bill how long a firm would be liable for the actual effects of its conduct and we therefore question whether a company would be liable for up to 10 years in accordance with section 80(5) of the Act. We provide two suggestions which may help to alleviate some of this uncertainty in the section below.

Other comments

In our view, while arguably not perfect, the current section 36 and its counterfactual test is most appropriate for the market conditions in Aotearoa New Zealand. An effects-based test risks being too uncertain and may fail to distinguish between positive competitive conduct and anti-competitive. This would unduly constrain strong but fair conduct by efficient businesses and have the effect of protecting other participants in a market, and in related markets, as opposed to promoting competition.

Without resiling from that position and our view that any amendment to section 36 of the Act is premature and should not be made in the form proposed, we outline several suggestions that would reduce uncertainty about the application of an effects-based test. These include:

- **Including a legitimate business justification defence in the Bill** to capture situations where the conduct undertaken was reasonably necessary to protect a legitimate business interest. This would provide more certainty to businesses than simply relying on the Commerce Commission's discretion not to prosecute. This concept was discussed in more detail in Russell McVeagh's submission on the Review of section 36 of the Commerce Act and other matters discussion paper.[6] In the equivalent EU regime, provision is made for a defendant to refute a claim of abuse of dominance if they can demonstrate that they have pursued a legitimate interest other than their own commercial advantage, and they have behaved in a proportionate manner. ICNZ is supportive of Russell McVeagh's suggested drafting for a similar section in Aotearoa New Zealand legislation,[7] as this will provide legislative certainty for conduct which clearly does not have an anti-competitive purpose but may inadvertently be caught by proposed section 36.
- **The Commerce Commission should also produce guidance** on their interpretation of the new test and the circumstances where they would not look to prosecute. For example, the ACCC's *Guidelines on misuse of market power* refer to "exclusionary conduct"[8] which helps to refine the broad term "conduct" that is used in the equivalent Australian legislation. For the avoidance of doubt, while guidance will have some value, it should not however, be seen as an alternative to getting the legislation right, particularly as the guidance does not bind the Commission. As is noted on page three of the ACCC's Guidelines, the courts are ultimately responsible for interpretation of the legislation and determining whether there has been a

[6] https://www.mbie.govt.nz/dmsdocument/7087-russell-mcveagh-review-of-section-36-of-the-commerce-act-and-other-matters-submission-pdf, pg 5.

[7] On page 6 of their submission, Russell McVeagh proposed the following wording: Nothing in this section applies to any conduct carried out by a person where that person can demonstrate that:

(a) it engaged in the conduct for the dominant purpose of protecting a legitimate business interest; and

(b) the conduct was reasonably necessary to protect that legitimate business interest.

[8] https://www.accc.gov.au/system/files/Updated%20Guidelines%20on%20Misuse%20of%20Market%20Power.pdf, pg 4.

breach of the misuse of market power provisions, and it is possible that the courts' decisions will be inconsistent with the ACCC guidance.

If the Bill were to pass as currently drafted, insurers would need to consider the possible application of section 36 to a number of areas of their business. As ICNZ previously stated in our 2019 submission, there is a risk that the proposed test if enacted will negatively impact on insurers' ability to robustly negotiate with the essential suppliers for meeting claims obligations to customers, such as loss adjusters, panel beaters, whiteware suppliers and builders. To provide the most expeditious and cost-effective service for customers, insurers need to be able to negotiate without the risk of breaching competition law.

Similarly, in our view, insurers should be free to select, or discontinue arrangements with service suppliers, where this is necessary to address risks to their business model, protect their customers' interests, capital, or other property, or to continue providing insurance services, without being seen as anti-competitive. We stress the importance of insurers ensuring good customer outcomes in this context, noting that this has also been the subject of regulatory attention. Preserving flexibility in this regard is particularly important to ensuring insurers can swiftly respond and put service arrangements in place to support their customers following a major event. Aotearoa New Zealand has been subject to major natural catastrophes in recent years and climate change impacts will see more extreme weather events occurring. It is critical that insurers can respond immediately to support New Zealanders in these situations and not be shackled by the need to avoid actions that might lessen competition. This is a very real situation that demands close co-ordination between insurers, suppliers, and in some circumstances with the EQC.

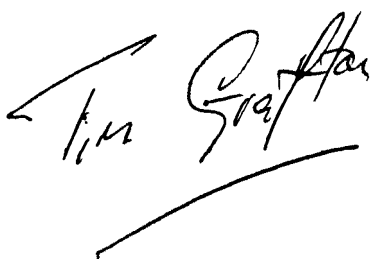
Finally, in addition to considering how the proposed amendments could impact on their own business operations, insurers would also have to manage the uncertainty arising for their customers, and any possible implications in these respects. This may result in insurance products providing cover for breaches of the Commerce Act being revised (with cover potentially being reduced, restricted, or removed) and/or additional premiums being charged for them, due to the increased uncertainty and broader exposure.

Conclusion

While we support robust competition laws in Aotearoa New Zealand, we do not agree that a case for amending section 36 has been made out and instead believe that we ought to take a 'wait and see' approach to ensure that legislative change to the equivalent provisions in Australia has the desired effect on market power, without causing any undesired or unintended consequences.

Thank you again for the opportunity to submit on the Commerce Amendment Bill. If you have any questions, please contact our Legal Counsel on (04) 475 8008 or by emailing jane@icnz.org.nz.

Yours sincerely,



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