ICNZ Insurance Council of New Zealand

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Targeted Commerce Act Review
Competition and Consumer Policy
MBIE

Emailed to: commerceact@mbie.govt.nz

To Whom It May Concern,

Re: ICNZ submission on the Issues Paper Targeted Review of the Commerce Act 1986

Thank you for the opportunity to submit on this review. We provide this submission for the Insurance Council of New Zealand ('ICNZ'). ICNZ represents the interests of its members, 28 general insurers (that is, not life and health insurers) licensed to operate an insurance business in New Zealand. Our members insure over $600 billion worth of New Zealanders' assets.

We understand that some of our members will also be providing submissions directly to MBIE with their individual company's views.

Anti-competitive exclusionary conduct

We do not have a definitive position on the best theoretical way for the Commerce Act to be tailored to respond to anti-competitive exclusionary conduct, subject to our limited comments below. The views of our members differ on this point, and will be provided in individual submissions to MBIE. However, we would like to make some general practical observations.

First, we do not believe a compelling practical case has been made out for change to section 36 because we do not agree with the statement that section 36 "appears to be failing to punish anti-competitive conduct by powerful firms" or that the legal tests applied by the Court are "pro-defendant". There is no clear experience outlined of definitively anti-competitive conduct by powerful firms in New Zealand worthy of justifying a change to the status quo. The case law referenced in the Paper describes firm conduct at the margins of the law that could be considered either legitimate commercial activity or illegitimate anti-competitive conduct. The 45 cases referred to in the Paper do not support a pro-defendant assertion. The cases that proceeded by way of a substantive hearing resulted in findings of contravention in 3 cases and no contravention in 6. This is

hardly indicative of a conclusion that section 36 is failing to punish anti-competitive conduct. Many of the unsuccessful applications for interlocutory relief were dismissed as a result of defective pleadings rather than any failure in the section 36 test and there have been many successful injunction applications which illustrates that section 36 is operating appropriately. We note the dicta in the case law cited in the Paper is not one of frustration by the courts at their inability to sanction clearly anti-competitive conduct because of shortcomings in the law.

We are also concerned that a change to section 36 could lead to a situation where there are more false positives than false negatives. New Zealand's courts currently have the right tools to sanction clearly anti-competitive conduct.

In our view, there needs to be deeper comparative analysis into how specific prosecutions that did not succeed under the existing section 36 would have fared when subjected to alternative exclusionary conduct provisions, using case studies from New Zealand and offshore. We understand that more practical examples will be submitted in response to the issues paper, and we await these and further analysis from MBIE before making further comment on this point.

Second, in our view the language of "maximising" the long term benefit to consumers is too extreme. The language is not in the Commerce Act, and it implies a preference for exclusionary conduct provisions that create more false positives in an attempt to reduce false negatives, rather than aim for the balance emphasised by the Productivity Commission. We also believe that potential benefits from alignment with other provisions and jurisdictions should not be overstated. The divergence of views on similar provisions taken by the Australian and New Zealand Courts cited at page 30 in the Paper is a good example of this. It is not surprising that similar provisions will be interpreted differently in different jurisdictions due to the broad variety of markets, consumer attitudes and spending, and local financial and taxation factors which means that alignment is not necessarily an imperative.

Third, we wish to stress that consideration of New Zealand's small and remote economy should be given additional weight compared to the other criteria. It is much easier for a dynamic and innovative firm to acquire substantial market power quicker and to a greater extent in smaller economies and in smaller markets within those economies. While closer monitoring may be warranted for this reason, we are concerned about the implication this could have for suppliers to insurance companies. Encouraging innovation and competition amongst service providers is vitally important to the insurance industry. In order to ensure that insurance premiums remain affordable in New Zealand, it is critical that insurance claims can be dealt with economically. As an industry, insurers engage heavily with loss adjusters, panel beaters, whiteware suppliers, builders and the like. An effects test could be more likely to give rise to false positives in this area and may discourage innovation and competition between suppliers for fear of falling foul of section 36.

The 45 cases relating to section 36 cited in the Paper illustrate competitors are "self-policing" in this area. Watering down the test for anti-competitive conduct could create a chilling effect as firms seek to keep their heads below the parapet rather than risk being sued by competitors for taking innovative steps and increasing productivity.

In addition, in order to promote competition amongst insurers and their suppliers, insurers need to have freedom to appoint approved suppliers without fear of being targeted as engaging in anti-competitive conduct. This ensures that economies of scale can be achieved which in turn keeps costs and premiums down which is better for the end consumer. It also encourages the suppliers to look for continued improvement in order to secure contracts with insurers which also encourages growth and competition in the supplier sector.

Alternative enforcement mechanisms

We support proportionate approaches to regulatory enforcement, and so we support flexibility in enforcement mechanisms at a regulator's disposal to appropriately match the particulars of any given alleged breach.

We agree that litigation is not always the most appropriate forum to handle regulatory breaches because of high costs and delays, and while our members do not have direct experience with the cease and desist regime, we agree with MBIE's analysis of the shortcomings of that regime, and support introduction of an enforceable undertakings regime as outlined.

Market studies

ICNZ supports regulation that promotes competition, provided the benefits of increased competition outweigh the costs of that regulation. For this reason, ICNZ may support a market studies power in principle if it could be shown that it is not overly costly or burdensome for market participants to comply with any market studies provisions.

We note the Productivity Commission has previously cited the insurance industry as appearing to have less intense competition than other industries based on several indicators.[1] In our view the market for insurance in New Zealand is competitive and we would welcome a mechanism for conducting a more comprehensive review of the competitive influences in New Zealand's insurance market.

However, we do not agree that there is a gap in New Zealand's institutional settings if the Commerce Commission's purpose remains promotion of competition. In our view, promotion denotes softer regulatory measures than the international market studies powers characterised in the issues paper.

If MBIE is of the view that there is a gap in institutional settings, we make the following submission in respect of procedural settings:

- The Commerce Commission is the appropriate body to conduct market studies. Involving the Productivity Commission would introduce another agency into the regulatory framework for insurers, which is already overloaded with separate regulators with major oversight for market conduct, competition, and prudential regulatory matters.

[1] Productivity Commission "Boosting Productivity in the services sector" May 2014 available at http://www.productivity.govt.nz/sites/default/files/services-inquiry-final-report.pdf.

- Information-gathering powers should remain voluntary for the reasons identified. The cost of compliance for insurers, and the potential to damage constructive regulatory relationships are particularly persuasive factors here.

We wish to underscore our concern about the cost of compliance that formal and mandatory market studies provisions could impose on firms. One member advises us that the Commission recently sent it an informal request for information relating to recent market consolidation. The request was 13 questions long and is voluntary. The request must cross the desk of many senior executives across multiple departments, and the member estimates the cost of preparing useful and comprehensive answers to the information request to be in excess of $20,000.

Obviously a formalised and more comprehensive set of information-gathering powers would be significantly more costly, and would be disproportionately severe for all but our largest insurers, who would not have the staff and resources to hand to readily comply with these kinds of requests.

Considerations about New Zealand's economy and market size are relevant to a market studies power. While we believe the status quo is adequate, if MBIE believed there was a gap that needed filling, a voluntary and informal market power could clarify the Commission's role in this area without posing undue costs on business, and would be fit-for purpose for New Zealand compared to a formal and mandatory power. We note that simply because other jurisdictions have the power does not make it suitable for New Zealand, and likewise we note that Australia does not have an equivalent power, which is an important consideration to further the goal of a single trans-Tasman economic market.

If you have any questions please contact our legal counsel, Nick Mereu, at nick@icnz.org.nz or (04) 495 8008. Thank you for your time and we look forward to hearing about the next steps of this targeted review.

Yours sincerely,

Nick Mereu
Legal Counsel