

28 March 2019

Competition and Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
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ICNZ submission: Review of Section 36 of the Commerce Act and other matters

Thank you for the opportunity to submit on the discussion paper titled *Review of Section 36 of the Commerce Act and other matters* ('discussion paper'), which was released by the Ministry of Business, Innovation and Employment (MBIE) in January 2019. This submission comments solely on the proposed changes to section 36 of the Commerce Act 1986.

ICNZ represents general insurers that insure about 95 percent of the New Zealand general insurance market, including about a trillion dollars' worth of 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, commercial property, and directors and officers insurance).

Submission

ICNZ recognises the importance of competitive markets and supports appropriate competition law to achieve this. Amongst other things, strong competition across all elements of an industry is fundamental to achieving good outcomes for customers.

We note it is too early to tell the effects of the recently made changes to section 46 of the Australian law¹ as it has yet to be tested in the Australian courts. We recognise there could be some benefits from increased Trans-Tasman consistency in this area but do not consider it is necessarily critical for New Zealand law to follow Australian law in this area. These and other factors could be better assessed once there is greater understanding of how it is being applied in Australia.

The first cases on the new section 46 are likely to be brought by the Australian Competition and Consumer Commission (ACCC) this year. It would seem worthwhile to take the opportunity to understand whether the new Australian test achieves the intended policy outcomes in practice, and whether it has chilling effects on pro-competitive behaviour, before adopting it here.

¹ Section 46 (Misuse of market power) of the *Australian Competition and Consumer Act 2010*, as effective from 6 November 2017.

As touched on in the discussion paper, we recognise there is a risk the proposed changes to section 36 of the Commerce Act could increase uncertainty and give rise to false positives, thereby having a chilling effect on business behaviour. Overall, with an effects-based test there is an intrinsic issue that it is not possible to ascertain the actual effect of conduct until after the conduct has occurred as it is by necessity a retrospective judgement. Responsible entities could obtain external legal and economic advice as to the likely effect of potential conduct but would remain exposed to the unforeseen and potentially unforeseeable consequences of their actions. To address this, it may be appropriate to consider whether the prohibition should require proof of purpose and effects or the inclusion of a defence where the effects weren't reasonably foreseeable.

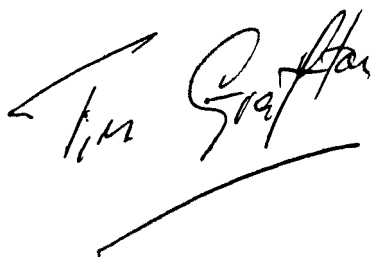
In progressing any changes to section 36 it would also be important to consider how to provide certainty to businesses in regard to the new provisions. Authorisations have a role but are time consuming and expensive and the ability for certainty to be provided by guidance from the Commerce Commission is likely to be limited unless it is highly nuanced, and it does not in any case bind the Commission. Other methods for providing certainty such as safe harbours may be worthy of consideration.

To achieve the overall objectives of the proposed changes it is important the implementation of any regulatory change in this area does not in turn discourage innovation and competition to the ultimate disadvantage of consumers. 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. Following a catastrophe, insurers also need to put in place arrangements with service providers that enable them to meet the needs of their impacted customers as swiftly as practicable while also enabling remediation to be undertaken in a cost-effective manner.

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 anticompetitive conduct. This ensures that economies of scale can be achieved which in turn keeps costs and premiums down, which is better for consumers. It also encourages suppliers to look for continued improvement in order to secure contracts with insurers, which also encourages growth and competition in the supplier sector.

Thank you again for the opportunity to submit on the discussion paper. If you have any questions, please contact our Regulatory Affairs Manager on (04) 914 2224 or by emailing andrew@icnz.org.nz.

Yours sincerely,



Tim Grafton
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