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Targeted Commerce Act Review
Competition and Consumer Policy
Ministry of Business, Innovation and Employment
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TARGETED REVIEW OF THE COMMERCE ACT 1986 – ISSUES PAPER

"The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct."[1]

1. Thank you for the opportunity to submit on the Ministry of Business, Innovation and Employment's (**Ministry**) *Targeted Review of the Commerce Act 1986 – Issues Paper*, November 2015 (**Issues Paper**).

2. We commend the Ministry for the significant work it has expended on preparing the Issues Paper – an excellent document which is both necessary and timely. In our view, the issues are important and should be considered in more detail.

Overview

3. In summary, our submissions on the substantive matters raised in the Issues Paper are:

#	RECOMMENDATION	BRIEF REASONS & COMMENTS
1.	We recommend proceeding to a full review of section 36 of the Commerce Act (**Act**), including an Options Paper.	The Commerce Commission (**Commission**) considers that the current test is unworkable, with the current Chair stating that: • the Supreme Court "*has not delivered the alignment with Australian jurisprudence*" and this is of "*particular concern*";[2] and • "[i]*n light of the Supreme Court's decision in the 0867 case, there is limited value that the* Commission *can currently provide by developing section 36 guidelines*".[3] Even if the Commission is wrong, there would seem to be a need for a change in the enforcement approach or law (or both) to have effective competition policy consistent with international best practice. We consider New Zealand's misuse of market power laws could be improved considerably without necessarily increasing type I errors.

[1] Australian Government, *Options to Strengthen the Misuse of Market Power Law, Discussion Paper*, December 2015 (**Australian Government Paper**), p3.
[2] See http://www.comcom.govt.nz/the-commission/media-centre/speeches/keynote-speech-for-the-12th-annual-competition-law-and-regulatory-review-conference-an-update-from-the-commerce-commission/. We also refer to the excellent paper by our former colleague Oliver Meech, *"Taking advantage" of market power,* NZLJ, November 2010, 309 (**Meech**). (Disclosure: Andrew Matthews provided input and peer review on Mr Meech's paper.)
[3] See http://www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2010/commission-ends-plans-to-draft-enforcement-guidelines-on-misuse-of-market-power.

2.	The Options Paper should take account of the Australian Government Paper (*Options to Strengthen the Misuse of Market Power Law, Discussion Paper, December 2015*).	Development of the Single Economic Market favours consistency with Australian law, which New Zealand has diverged from.[4] There is value in taking into account Australian developments.
3.	We support a review of alternative enforcement mechanisms.	The cease and desist powers were not supported by the Commission when introduced, and do not seem to have achieved their intended purpose. A workable section 36 test may assist in enforcing administrative settlements. Ideally an enforcement body could intervene to keep the competitive process going, in a timely and low-cost way, not unlike a sports referee. However, that ideal may not be achievable in New Zealand, and there could be potential challenges with the design of an appropriate mechanism. If there were an appropriate alternative enforcement mechanism (enabling timely intervention) and a pure effects test for unilateral conduct, then it may also be worth considering whether significant pecuniary penalties were necessary in those circumstances.
4.	We support considering a market studies function.	New Zealand has highly concentrated market structures. It may assist policy making and enforcement to have greater scrutiny and the ability to identify markets where workable competition is absent, as is common offshore. It is a gap in the current regime.

Section 36

4. We have sympathy for the Commission's concerns regarding section 36.

   a. At best, the law on section 36 is unclear following *The Commerce Commission v Telecom Corporation of New Zealand Ltd and Telecom New Zealand Limited*, [2010] NZ SC 111 (**0867**).

   b. Even prior to 0867, the combined effect of *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC) and *Carter Holt Harvey Building Products Group Ltd v Commerce Commissio*n [2006] NZLR 145 (PC) (**Carter Holt (PC)**) was to risk making the "take advantage" aspect of the section 36 test unworkable.

   c. In particular if a firm with substantial market power could raise a credible "commercial rationale" for its conduct this risks being seen, in effect, as a "complete defence" to allegations of abuse or misuse of substantial market power.[5] In practice this may be a simple as pointing to the same conduct undertaken in other markets by non-dominant entities.

5. While we consider that the test can be improved, we acknowledge the need to minimise type I and type II errors, as highlighted in the Issues Paper. Many commentators are of the view that

[4] See Andrew Matthews & Oliver Meech, *Submission on the Commerce (Cartels and Other Matters) Amendment Bill*, 6 September 2012 (**Matthews & Meech**), at section 6.

[5] We note the comments of the Productivity Commission at page 129 of its May 2014 report, *Boosting Productivity in the Services Sector*: "*Critics of s 36 and its jurisprudence argue that the counterfactual test is too difficult to satisfy because it is too easy to find reasons why a firm without market power would have acted in a similar way to the alleged misconduct*."

there is little risk of type I errors under the current law, and the law could be improved without necessarily increasing type I errors.

6. Similarly, concerns about the uncertainty of a "competitive effects test" may be overstated given that much conduct that is typically thought of as unilateral conduct can be assessed under section 27 of the Act when manifested in contracts, arrangements or understandings.

General comments

7. Matthews Law is New Zealand's only specialist competition & regulatory law firm. We have significant international and domestic experience, including acting for both access providers and access seekers in most major industries. We are, or have been, involved in international comparative law forums, including the International Bar Association (**IBA**), Inter-Pacific Bar Association, International Competition Network, International Academy of Comparative Law, and American Bar Association.

8. We expand on this summary in our responses to the Issues Paper's questions below. We would be happy to meet or discuss any of our comments further.

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Anti-competitive exclusionary conduct

2.1 Matters at issue	
1	***Has the Ministry accurately described the type of conduct that countries typically seek to prohibit?***
	Yes, broadly speaking the Ministry has accurately described the type of conduct that countries typically seek to prohibit (although we might categorise the conduct a little differently). We would typically include loyalty discounts, excessive delays and unfavourable trading terms in any list of the relevant types of conduct (although we note that such discounts are noted later in the Issues Paper). Many commentators distinguish between tying and bundling. It may also be appropriate in the circumstances to consider the "totality of conduct". In many cases firms with market power will engage in a range of different activities which by themselves may not appear anti-competitive but when taken collectively could raise concerns about exclusionary effects resulting in a substantial lessening of competition (**SLC**) (eg raising rivals' costs; creating reputational or actual barriers to entry).
2.2 Benchmark of approaches to anticompetitive exclusionary conduct	
2	***Has the Ministry accurately described the different approaches countries take in their rules against anti-competitive exclusionary conduct?***
	We refer the Ministry to the IBA's submission on the Issues Paper. We note that besides hard core cartels it is not clear that foreign regimes necessarily treat multilateral conduct more harshly than New Zealand.
2.3 The New Zealand regime	
3	***Has the Ministry accurately described the main elements of New Zealand's rule against anti-competitive exclusionary conduct?***
	Yes, we broadly agree that the Ministry has accurately described the three elements that must be demonstrated to prove a breach of section 36 of the Act. As the Ministry is no doubt aware, there are many nuances to each element which are difficult to capture in a paper of this nature.
4	***In your opinion, what justifications can there be for requiring that a firm with a substantial degree of market power "take advantage" of that power?***
	The nexus argument The key justification raised for requiring that a firm with a substantial degree of market power[6] "take advantage" of that power is the need to establish a nexus between the firm's market power and the relevant conduct. "Taking advantage" of that power is thought to be a mechanism or tool to distinguish normal competitive conduct from anti-competitive exclusionary conduct – in other words, establish causation. In this sense a common view is that firms with market power should not be penalised for competing vigorously or be required to protect inefficient non-dominant firms from competitive conduct. This sentiment is often expressed as a monopolist "…*has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches*…".[7] The Australian Government Paper usefully sums this view up, stating that: • *"… firms are entitled, and indeed encouraged, to succeed through competition, even if they put competitors out of business …The role of section 46* [the equivalent of section 36] *is to distinguish vigorous competitive activity, which is desirable, from economically inefficient, monopolistic practices that may exclude rivals and harm the competitive process. To use a sporting analogy,* ***section 46 should not seek to prevent a team from winning a grand final by training harder, having better skills or using better strategies, but it should prevent teams from refusing to allow their opponents access to the field.***"[8] (emphasis added) Without such a mechanism it is said that the prohibition risks being too broad and capturing a range of pro-competitive or irrelevant conduct. This is viewed as having a chilling effect on competition. For

[6] The term substantial degree of market power, or SMP, is referred to as "market power" or "dominant firm" (or similar) as the context requires in the remainder of this submission.

[7] *Olympia Equipment Leasing Co v Western Union Telegraph Co* 797 F 2d 370, 375 (1986) (7th Cir).

[8] Australian Government Paper, p3.

example, it is often said that a firm with market power that burnt down its competitor's factory could breach the prohibition if the firm had an anti-competitive purpose. This is clearly an extreme example designed to illustrate a point and assumes that a court would not read into such a prohibition that the relevant conduct must be "market" related conduct.

While the arguments supporting the need for a relevant nexus have a sound basis it is widely acknowledged that the term "taking advantage of" is difficult to interpret and apply in practice. The courts' use of the sole counterfactual test to determine whether or not there has been a "taking advantage" of market power has been viewed by many as too restrictive and thus rendering the test unworkable. Many consider that if a firm has a good commercial rationale for its conduct this may risk being seen as a complete defence and thus ignores the potential harm to competition.

RBB Economics noted this concern, stating:[9]

- *"Specifically, to what extent should the fact that firms without market power behave in this same way create a safe harbour (or at least a presumption of innocence) for the firm with market power that adopts this same conduct?* ***Some commentators have observed that the 'taking advantage" of provisions in the current section 46 have been interpreted such as to provide such a safe harbour****. In its submission to the Competition Policy Review, the ACCC comments that this situation has led to an enforcement gap – an inability of the ACCC to prosecute cases in which it believes that market power has been used to generate anti-competitive outcomes*." (emphasis added)

Dominant firms should be allowed to compete in the same manner as non-dominant firms

Closely linked to the view that the prohibition needs a nexus element is the view that there should be one set of rules for all players. That is, dominant firms should not be prohibited from competing in the same manner as non-dominant firms. This was illustrated in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1; 178 ALR 253; ATPR 41-805 (HCA) (**Melway**) where Melway had developed its exclusive distribution strategy (which was the conduct being challenged) before it gained its market power.

The counter-arguments to this view are expressed in the following statements:

- *"The Harper Panel noted that the 'take advantage' test is not best adapted to identifying misuse of market power. The 'take advantage' test allows firms with substantial market power to engage in particular business conduct if firms without market power can also commercially engage in that conduct.* ***The Panel considered that business conduct should not be immunised merely because it is often undertaken by firms without market power.*** *Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation might be competitively benign when undertaken by a firm without market power, but competitively harmful where a firm has market power.*[10] (emphasis added)
- ***"Since the same conduct can have different economic effects in different circumstances, it follows that conduct can be anti-competitive when it is pursued by a firm with market power even if it is unproblematic in situations where such power is absent****. If one considers most of the categories of conduct that can give rise to anti-competitive outcomes — price discrimination, exclusive dealing, loyalty rebates, bundling, refusal to deal, etc. — it is evident that these are also commonly observed phenomena in many well-functioning competitive markets".*[11] (emphasis added)
- *"However, as observed by Katharine Kemp,* ***US jurisprudence recognises that particular conduct might be competitively benign when undertaken by a firm without market power but competitively harmful where a firm has market power****".*[12] (emphasis added)

For completeness, we are not aware of *Melway's* contracts being challenged under Australia's equivalent of section 27, so presumably that case would not have been decided differently under an (SLC) "effects" test. The same can be said of *Carter Holt (PC)* in New Zealand (the *INZCO* case).

[9] RBB Economics, *Response by RBB Economics to proposals relating to the misuse of market power and introduction of "concerted practices"*, November 2014, (**RBB Submission**) p4. This submission on the Draft Harper Review Paper can be accessed at http://competitionpolicyreview.gov.au/draft-report/non-confidential-submissions/.

[10] Australian Government Paper, p5.

[11] RBB Submission, p4.

[12] Australian Government Paper, p15.

In respect of the points above it would seem that the courts at the very least need further guidance on the "taking advantage of" element and provisions should be introduced to the Act to mirror (or expand on) s46(6A) of the Australian Competition and Consumer Act 2010. We note that the Act did provide some guidance on dominance prior to the amendments in 2001 that replaced the "use of dominance" test with the "taking advantage of market power" test.

Other justifications

Other justifications raised for requiring that a firm with a substantial degree of market power "take advantage" of that power include:

- The view that it is better to avoid type I errors than type II errors as type I errors are viewed as having greater potential to have a damaging chilling effect on pro-competitive conduct. Accordingly there will necessarily be fewer cases successfully prosecuted. Whether or not type I or II errors can have a more detrimental effect may depend on the particular market(s) in question. Certainly, a larger number of type II errors can chill competition.
- The need for consistency with the existing Australian test. However the Australian Government has stated:[13] "*…in order to facilitate trade and limit transaction costs* ***Australia's competition laws should be, as far as appropriate, consistent with its trading partners****. This will facilitate business from an economic perspective as well as compliance with competition laws for companies involved in such international trade and commerce*." As noted in the Issues Paper, both New Zealand and Australia's tests are out of line with that of the US, EU and Canada.

No "nirvana" for section 36?

Based on international experiences, there may appear to be no "nirvana", or perfect section 36 test available. However that should not be a reason not to seek to improve New Zealand's current competition laws. We consider that New Zealand's misuse of market power laws could be improved considerably without necessarily increasing type I errors.

Competition agencies around the world have grappled with the challenge of defining or agreeing the correct approach to deal with unilateral conduct. As noted in the Issues Paper, it is also a constant source or debate between competition (antitrust) practitioners. The following examples illustrate the difficulties faced when reviewing competition tests for unilateral conduct, although as noted above we do not see these as an impediment to improving our own laws:

- The well documented failure of the Federal Trade Commission and Department of Justice in the US to agree an approach lead to the parties withdrawing their draft joint report on "*Single-Firm Conduct under Section 2 of the Sherman Act (2008)*" in May 2009.[14] This decision is widely recognised as partly due to opposing political persuasions.
- The European Commission's 2005 review of unilateral conduct (at the time art 82 EC, now art 102 TFEU) ultimately only set a goal of publishing "guidance" on its enforcement priorities (implemented in 2008).[15] It has been noted that "[e]*ven the guidance has been criticised by some as a missed opportunity to state more categorically what dominant firms can and cannot do*".[16]
- The IBA Paper notes that while the Working Group "*…provided comments on the EU position,* [it] *wishes to emphasise that the practical application of Article 102 TFEU is subject to ongoing debate and refinement in the Courts*."[17]

In New Zealand, the former Chair of the Commission announced in 2009 the appointment of a panel to review the effectiveness of section 36.[18] However, that panel was subsequently dissolved by the current Chair. In a 2010 media release the Commission stated that "*it will no longer develop guidelines on section*

[13] Australian Government Paper, p2.
[14] See: http://www.justice.gov/atr/dojs-single-firm-conduct-report-promoting-consumer-welfare-through-clearer-standards-section-2.
[15] See: http://europa.eu/rapid/press-release_IP-08-1877_en.htm?locale=en, "Guidance on it enforcement priorities in applying EC Treaty rules on abuse of a dominant position to abusive exclusionary conduct by dominant undertakings".
[16] Meech, p392.
[17] Submission to the Australian Government Competition Policy Review by the Antitrust Committee of the International Bar Association, 27 June 2014, pp21-22 (**IBA Paper**).
[18] See http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2009/commercecommissionreviewofenforcem.

	36",[19] with the Chair being quoted as saying "[i]*n light of the Supreme Court's decision in the 0867 case, there is limited value that the Commission can currently provide by developing section 36 guidelines*".[20]
5	***What justifications can there be for a purpose-based (rather than effects-based) approach? Why do you think Australia adopted such an approach with its Trade Practices Act 1974?***
	Why purpose? We suspect that Australia's decision to adopt a "purpose-based" approach with its Trade Practices Act 1974 may have been a result of competition laws being primarily influenced by the legal profession without necessarily being overly concerned with economic theory. Like section 36, the Australian prohibition also presupposes a monopoly (or at least oligopoly), and the relevant conduct is assumed to be directed at a particular party. In this sense the focus on the dominant firm's purpose would seem to be a reflection of that presumption. However many commentators share the view that if competition laws are concerned with the harm to the competitive process, then the purpose of a dominant firm's conduct is irrelevant as it does not address that concern. As many cases have noted, the purpose of competitors is to "*almost always try to 'injure' each other".*[21] In this sense many commentators, especially economists, see the use of purpose in such a test as inappropriate. We also note that there has been much debate on whether the purpose element in section 36 is an "objective" or "subjective" assessment. This includes the following comments: • *"There will be very little difference in most cases between ascertaining subjective purpose by inference from what was said and done and ascribing objectively a purpose from evidence of what was said and done…"*[22] • *"Proof of purpose, in the nature of these cases often will turn upon inferences drawn from actions and circumstances, with a sprinkling of internal memoranda and correspondence. Protestations of inner thoughts which do not reconcile with objective likelihoods are unlikely to carry much weight. In many cases, and this ultimately is one, both objective and subjective standards are met."*[23] It would now seem relatively settled that purpose is effectively an objective test which can be subjectively informed. As noted by Clifford J in *Commerce Commission v Bay of Plenty Electricity Limited (13 December 2007) HC, Wellington, CIV-2001-485-917* (**BOPE**), *"…we think the primary enquiry is an objective one, but that evidence of subjective statements of purpose and intention can be relevant."*[24] **The uncertainty argument** The key justification raised for a "purpose-based" approach is the need for certainty. Many commentators have expressed the view that it is easier for a dominant firm to self-assess the purpose of its conduct as opposed to assessing the "effects" of its conduct. This is on the basis that the firm may not have all the necessary market information to conduct a sufficient assessment. The Australian Government's Paper captures the uncertainty debate in the following statements: • "*…those opposing reform are concerned that introducing an effects test would create uncertainty and so 'chill' competitive behaviour by firms in the market, which would be harmful to consumer welfare*."[25] • *"A number of submissions express concern about introducing the 'substantial lessening of competition' test into section 46. They suggest the change would increase business cost and uncertainty because a business has relatively more information about the purposes for which it engages in conduct compared to the effect of its conduct on competitors (see for example, Business Council of Australia, DR sub, page 16).*[26]

[19] See www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2010/commission-ends-plans-to-draft-enforcement-guidelines-on-misuse-of-market-power.
[20] See http://www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2010/commission-ends-plans-to-draft-enforcement-guidelines-on-misuse-of-market-power.
[21] *Queensland Wire Industries Pty Ltd* v *Broken Hill Proprietary Company Limited* (1989) ATPR 40-925 at 50,010.
[22] Gault J, *Port Nelson Ltd v CC* [1996] 3 NZLR 554; (1996) 7 TCLR 217 (CA). p564; p227.
[23] *Union Shipping NZ Ltd v Port Nelson* [1990] 2 NZLR 662.
[24] BOPE, at [325].
[25] Australian Government Paper, p5.
[26] Australian Government Paper, p18.

- *"The proposed move to include an effects test has been the most contentious aspect of the changes to section 46 proposed in the Harper Review".*[27]
- *"The Panel considers that the long-running debate concerning 'purpose' and 'effect' in the context of section 46 has been somewhat unproductive. In one sense the concerns raised by both sides of the debate are correct."*[28]

The IBA's Working Group also submitted in respect of the Draft Harper Review that:

- *"The potential downside of an effects-based approach is of course that this can reduce certainty for businesses (in self-assessing their own conduct, or seeking to challenge that of rivals or suppliers/counterparties with market power)."*[29]
- *"[u]ncertainty about the scope of the prohibition is exacerbated by the lower market power test currently adopted in the Australian legislation (a substantial degree of market power) rather than the market dominance requirement present in EU law. Care would need to be taken to ensure pro-competitive conduct was not inadvertently stifled by a new test."*[30]

As the Harper Report concluded, a "purpose-based" approach is also out of line with many jurisdictions including the US, EU, Canada and UK which have an "effects-based" approach. This led the Australian Government Paper to note that "*Australia is almost unique (save for New Zealand, whose analogous law substantially follows the approach in section 46) in adopting both the 'take advantage' limb and a test based only on anti-competitive purpose."*[31] As many consider Australia to be an outlier, it is arguable that New Zealand is further along the spectrum and risks being seen as permanently stuck in the outfield.

The Australian Government Paper also noted in respect to an effects-based test that *"[e]qually, competition laws have been framed (and interpreted) in a manner that is designed to minimise the risk that the law might chill competitive behaviour".*[32] This suggests that an "effects-based" test should be considered in an Options Paper to see whether it would be appropriate for New Zealand.

Many commentators consider that concerns about an effects-based approach resulting in increased uncertainty for firms may be overstated. As the Issues Paper notes, the Act includes effects-based competition tests for anti-competitive arrangements (section 27) and mergers (section 47). Accordingly firms are already subject to effects-based tests that require them to self-assess the effect of their conduct (when manifested in "contracts, arrangements or understandings") – this is not a novel concept.

Submissions on the Draft Harper Review noted: *"… **the concepts of 'substantial degree of power', 'purpose', 'effect', and 'substantially lessening competition' are all well understood from past cases** and therefore tractable for the purposes of allowing ex ante guidance for business conduct"… This incorporates 'standards and concepts … at least well enough known as to be susceptible to practically workable ex ante analysis'.*[33] (emphasis added)

The Australian Government's Paper noted that: "*The Panel agrees with the Australian Competition and Consumer Commission (ACCC) that the uncertainty 'should not be unduly significant as the change is to an existing test with which businesses are already familiar'".*[34]

Many would consider these views equally applicable in the New Zealand context the given considerable jurisprudence on the same concepts in New Zealand, often drawing on Australian case law. If an "effects-based" test was considered appropriate for New Zealand we would anticipate that, in practice, the test may not be too dissimilar to the principles approach set out in *U.S. v Microsoft Corp* 253 F.3d 34 (D.C. Cir. 2001).

Timing of effect

Another concern raised is in relation to (perceived) difficulties if an effects-based test captured the effects of conduct in the future rather than solely the effect of the conduct at the time it was entered

[27] Australian Government Paper, p7.
[28] Australian Government Paper, p13.
[29] IBA Paper, paragraph 5.13.
[30] IBA Paper, paragraph 5.12.
[31] Australian Government Paper, p6.
[32] Australian Government Paper, p13.
[33] Minter Ellison, *Submission on Draft Report of the Competition Policy Review*, November 2014 (**Minter Ellison Submission**), p5. See http://competitionpolicyreview.gov.au/draft-report/non-confidential-submissions/.
[34] Australian Government Paper, p18.

into. This is viewed as increasing the uncertainty as dominant firms are required to continually assess their conduct in changing market conditions to determine whether it has an anti-competitive effect.

Again this is not a novel concept. Section 27 prohibits (1) the entering into and (2) the giving effect to a provision in an arrangement that has the purpose or (likely) effect of substantially lessening competition in a market. In other words, an arrangement may not harm competition when it is entered into, but giving effect to that same arrangement 10 years later may be viewed as anti-competitive.

Shell (Petroleum Mining) Co Ltd v Kapuni Gas Contracts Ltd (1997) 7 TCLR (**Kapuni**) provides an example where arrangements may be justified as initially pro-competitive (or competitively neutral) but later viewed as anti-competitive. In *Kapuni* the High Court held that a long-term gas contract became anti-competitive and breached section 27, stating:

- "*Here we have a long-term contract in a wholesale market, effectively totally foreclosed to competition, which contract has run for 29 years. …it might run for another 20 years…We do not believe that the exploration and efficiency arguments are sufficient to overcome the foreclosure of competition….We find the contract to be anticompetitive and thus in breach of s 27…**Had we been asked in 1986, to authorise the agreement, with the benefit of hindsight, on a mixture of competition and public benefit grounds, we might then have been persuaded to let the contract run to 1991 or even 1996***…"[35] (emphasis added)

Section 27 and Port Nelson

Importantly, conduct that manifests in a contract, arrangement or understanding (collectively "arrangement") is already subject to the Act's general competition test in section 27 for anti-competitive (non-unilateral) conduct. In other words, absent a straight refusal to supply, it is arguable that much conduct that may, at least initially, be viewed as unilateral conduct could potentially be viewed as bilateral or multilateral conduct.

This is on the basis that much relevant conduct requires some form of arrangement with another party, often a customer. In this sense some commentators would say that much single-firm conduct is subject to a competition test that does not require a nexus to the firm's market power. Therefore concerns in relation to an "effects-based" test may be misplaced as firms are already subject to such a test in many cases.

In *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (**Port Nelson**), some 20 years ago, a tying, discount bundling and minimum charge case was analysed in part under section 27 of the Act (as well as section 36). While the conduct may have been seen as an abuse of market dominance (ie unilateral conduct), the court also relied on section 3(5) of the Act, which provides for the aggregation of provisions of contracts, arrangements or understandings to help assess overall anti-competitive effect under section 27:

- *3(5): For the purposes of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition in a market if that provision and – (a) the other provisions of that contract, arrangement, or understanding; or (b) the **provisions of any other contract, arrangement or understanding** to which that person or any interconnected body corporate is a party – **taken together, have or are likely to have the effect or substantially lessening competition in that market**.* (emphasis added)

The court held that the aggregated effect of the Port's minimum pilotage charge (which was below cost), the tying of its tugs (which it had market power in) to its pilotage services, and a 5% discount if customers used all of its services (a bundle of contestable and non- contestable services) was likely to substantially lessen competition and breach section 27.

As another example, in 2007 the Commission investigated the conduct of the Hermitage Hotel, the sole provider of accommodation at Mt Cook, which tied the provision of accommodation with meals. The Commission concluded that *"…**the tie amounted to a breach of section 27 of the Commerce Act in that the arrangements entered into between the Hermitage and the purchasers of accommodation,** which*

[35] Kapuni, p532.

	gave effect to the tie, had the purpose and likely effect of substantially lessening competition in the dinner market at the Village."[36] (emphasis added) Notwithstanding the above, it is unclear what appetite (if any) the Commission has to pursue unilateral conduct through the courts using section 27.
6	***Does section 36(1) make sense, given that authorisations do not apply to section 36(2)?***
	As the Issues Paper notes, section 36(1) provides an applicant with the certainty that conduct that the Commission has authorised will not be challenged by a third party under section 36. This would seem to avoid applicants having to respond to spurious claims under section 36. There may be scenarios where authorised conduct develops over time into conduct that raises section 36 concerns, but this would seem to be a rare exception. (There is also a risk that an authorisation inadvertently or impliedly permits broader conduct that cannot then be challenged under section 36.) The Commission has the power to revoke or amend authorisations including in circumstances where there has been a material change in the circumstances since the authorisation was granted (section 65(1) of the Act). Such circumstances could include where an applicant has obtained a monopoly. While the context is arguably different and could be distinguished, we note the opposite presumption in section 44(1A) of the Act, ie that section 36 *does* apply in relation to certain conduct by parties who are (or would be) interconnected bodies corporate.[37]
2.4	**Framework for assessment**
7	***Has the Ministry identified the right criteria for assessing the adequacy of section 36 of the Commerce Act? Should any criteria identified be excluded, or should criteria not mentioned be added?***
	We broadly agree with the Ministry's criteria for assessing the adequacy of section 36 although we note that the criteria should not solely focus on the long-term benefit of consumers at the expense of the long-term effectiveness of workable competition. Competitive markets require conditions that are also in the long-term benefit of businesses. In this sense, generally what is beneficial for all businesses is generally beneficial for competition and ultimately consumers in the long term. In the context of the possible defence raised in the Harper Review it was submitted "... *the 'long-term interests of consumers' … is a standard which isn't properly capable of practically workable ex ante application. Businesses are often not well equipped to assess the long term interests of consumers. They are usually more interested in more immediate buying preferences and buyer behaviour rather than considering how consumers' interests will be served over the long term."*[38] We also note that in the context of section 67 of the Act (merger authorisations) the High Court in *Air New Zealand and Qantas Airways Limited v Commerce Commission* (2004) 11 TCLR 347 rejected the view that benefits which do not flow directly to consumers should not be counted and instead endorsed a total welfare test: • *"[239] Mr Land, for Gullivers, submitted that the introduction in 2001 of s 1A of the Act required a change in approach. Section 1A provides: "The purpose of this Act is to promote competition in markets for the long term benefit of consumers within New Zealand."* ***It was submitted that the reference to consumers signalled a shift in the balance which the Act seeks to achieve between the interests of consumers and economic efficiencies****. Mr Land submitted that s 3A which requires the Commission to have regard to any efficiencies in determining whether conduct will result or will be likely to result in a benefit to the public, should be read subject to s 1A so as to exclude benefits which do not flow directly to consumers.* • *[240] The appellants and the Commission both oppose Gullivers' submissions. They submit that the purpose provision does not override s 3A which requires the Commission to have regard to 'any efficiencies' in its assessment of benefit to the public. They say that had Parliament intended to change the established meaning of the public benefit test it would have done so explicitly as it did in 1990 with the introduction of s 3A. Rather, the words 'benefit to the public'*

[36] See http://www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2007/settlementreachedoverdinnerdealatt.

[37] Section 44(1A) of the Act was inserted by section 10(1) of the Commerce Amendment Act 2001, which also repealed section 44(1)(b) of the Act. Before its repeal, section 44(1)(b) provided that nothing in Part 2 of the Act applied to "*the entering into of a contract, or arrangement, or arriving at an understanding, or the giving or requiring the giving of a covenant, where the only parties, or (in the case of a covenant or proposed covenant) the only persons who are or would be respectively bound by, or entitled to the benefit of, the covenant or proposed covenant, are or would be interconnected bodies corporate*"

[38] Minter Ellison Submission, p5.

	remain intact; the term 'public' is intentionally broader than 'consumers'; and an efficiency gain that benefits producers is still a benefit to the public. • *[241]* ***We are satisfied that the introduction of s 1A should not disturb the Commission's established practice of treating as neutral any wealth transfers between New Zealand consumers and producers****. Determinations of authorisation applications under the Act are properly concerned with balancing any efficiency detriments associated with breaches of the statutory competition standard, against any efficiency gains that may result from the business acquisition or contractual arrangement in question. It is the balancing of these real resource impacts on the economy that best serves the long-term interests of consumers. The inclusion of ad hoc wealth transfers, which are not losses to society, would distort the efficiency assessment by assuming additional economic harm to the public of New Zealand. In any event, consumers might well be the ultimate beneficiaries."* Given that the Single Economic Market has previously been stated as a driver for competition law in respect of introducing criminalisation of cartel conduct in New Zealand,[39] we consider harmonising section 36 with Australian law is a consideration worthy of further investigation. The Ministry has also identified aligning section 36 with the Act's other prohibitions as other potential criteria, which we again consider worthy of further investigation.
8	***Should the criteria used be given equal weight?***
	On the face of it, it would seem appropriate to give the criteria equal weight, although we refer to our comments in respect to the long term benefit of consumers in question 7.
2.5 Assessment of the New Zealand regime	
9	***Do you agree that section 36 may not effectively assure the long-term benefit of consumers? If you agree, are there any sectors of the economy where you consider this to be well illustrated? If you disagree, please explain why.***
	Many commentators have certainly expressed this view – see our response to question 4. That this sentiment is held by many suggests that further investigation into the validity of these concerns (including identifying relevant evidence) may be warranted. There would seem to be some validity in the view that if a test does not take into account the effect of conduct on the competitive process then it may not necessarily be assuring the long-term benefit of consumers or businesses for that matter. As has often been said, conduct undertaken by a non-dominant firm may be pro-competitive, however when that same conduct is undertaken by a dominant firm it can have anti-competitive effects given the firms' different attributes. For example, exclusive arrangements are common in competitive markets, but the effects on competition caused by a party with a 95% market share could be very different to a party without market power. Because New Zealand has a relatively permissive merger test it may be thought that it should have a more effective monopolisation test to provide sufficient "checks and balances" on post-merger conduct.
10	***Is it fair to say that businesses will generally know if they are acting in a way that they would not in a competitive market – i.e. that the current test is sufficiently predictable?***
	In our experience large firms seek ex ante specialist advice on whether or not their conduct could be considered anti-competitive. We would expect that behaviour to continue, even if the section 36 test was improved. In the context of a section 47 (business acquisitions) case, Miller J held in *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679; 8 NZBLC [239] that: • *"The test must be directed to the facts that have led the Court to conclude, as against the acquirer, that the acquisition is likely to substantially lessen competition. In that context, the essential facts must begin with the knowledge of the number and size distribution of the market participants. That in turn involves an appreciation of the extent to which substitution occurs, since that defines the boundaries of the market. There must also be some appreciation of the things that create market power (such as barriers to entry, product differentiation, and vertical integration).* ***This is an imposing list, but it comprises things that any substantial and***

[39] The proposal to criminalise cartel conduct has now been abandoned. See http://www.matthewslaw.co.nz/nz-government-bucks-the-trend-drops-cartel-criminalisation/.

	***longstanding market participant is likely to know, at least in general layman's terms, because success in business depends on them**."* (emphasis added) The Court of Appeal did not dispute Miller J's view, stating: "[t]*he Judge said that was "an imposing list", but businessmen could be expected to know these things "because success in business depends on them"".*[40]
11	***Do you agree that section 36 – as applied by the courts – is too complex to ensure that it is cost-effective and timely?***
	Constructing a hypothetically competitive market is not a simple exercise. It requires numerous assumptions and decisions, and there will undoubtedly be debate on how this hypothetical business is constructed and behaves. Many would consider that the law should be more concerned with facts than hypothetical models. Deciding which attributes the firm should keep and which attributes should be stripped from the firm is a difficult and necessarily imperfect exercise, as those are the factors that give the firm its market power. What assumptions and attributes end up going into the counterfactual will affect how the conduct is viewed. Ultimately, the test is arguably neither intuitive nor workable. We do have concerns about time delays, the cost of litigation, and lack of timely guidance for all parties concerned. The following cases may illustrate this point: • In the 2004 case *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1 NZLR 145; (2004) 11 TCLR 200 (PC), the Privy Council was considering conduct from 1994 – 10 years after the event. • In the 2012 case, *Telecom Corp of New Zealand Ltd v Commerce Commission* [2012] NZCA 278, the court of Appeal was considering conduct from 1998 – 14 years after the event. • Similarly in the 2010 case, *Commerce Commission v Telecom Corp of New Zealand Ltd* [2010] NZSC 111, [2011] 1 NZLR 577 [0867], the Supreme Court was considering conduct from 1999 – 11 years after the event. Given that competition is an ongoing and dynamic process it is not conducive to have such delays in determining the rules by which firms play. The potential loss of competition due to such delays may be high.
12	***Do you agree that section 36 – as applied by the courts – is not well aligned with other relevant provisions?***
	Yes, we broadly agree with that critique. Sections 27 and 47 include an "effects-based" competition test and section 29 includes a similar defence test.
13	***Given your view on the correct implication of having a small and remote economy, do you consider that section 36 appropriately reflects that implication?***
	If the concern here is that an "effects-based" test may be seen to prohibit conduct that would otherwise benefit New Zealand then one option could be to consider whether authorisation is available for such conduct.
2.6 Conclusion	
14	***For each of the criteria it has adopted, has the Ministry's assessment been well-reasoned?***
	Yes, we broadly agree that for each of the criteria it has adopted the Ministry's assessment has been well-reasoned, although refer to our response to question 7.
15	***If you are submitting that the criteria for assessment should be different from those used by the Ministry, how might the assessment be different using your preferred criteria?***
	Refer to our response to question 7.
16	***Do you agree with the Ministry's conclusion? Please explain why.***
	Yes, we broadly agree with the Ministry's conclusion as outlined in the points made in the preceding questions. As noted, we recommend proceeding to a full review of anti-competitive exclusionary conduct in section 36 of the Act, including an Options Paper.

[40] *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 at [122].

17	***Do you have any other comments you wish to make about the Ministry's approach to assessing the current law on anti-competitive exclusionary conduct?***
	To discuss.
2.7 Potential options for reform	
18	***Which of the potential options identified would you like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would be worthy of consideration.***
	In our view it would be beneficial to canvass at least Options 1 and 4 (and their variants) if the Ministry publishes an Options Paper. Option 2 risks being viewed as inappropriate given its focus on purpose rather than harm to the competitive process. Option 3 would not seem likely in practice to be materially different to the existing law given that it will retain the "take advantage of" element and its accompanying sole counterfactual test jurisprudence.
19	***Which of the potential options identified are not worthy of discussion if the Ministry publishes an options paper next year? Please explain why these options would not be worthy of consideration.***
	Refer to our response to question 18.
20	***Are there any other potential options that the Ministry should consider?***
	Refer to our response to question 18.
21	***In the event that an options paper is issued, what criteria should the Ministry use to assess the options the paper includes? In principle, should they be the same as whatever criteria are finally used to assess the adequacy of the New Zealand regime?***
	Yes, for consistency they should be the same as the criteria to assess the adequacy of the existing New Zealand regime.

Alternative enforcement mechanisms

3.1 Matters at issue	
22	***Do you agree that standard enforcement of the Commerce Act (litigation by the Commerce Commission in the courts) faces high costs and long delays? Please give reasons for your view.***
	Yes, in our experience enforcement via court proceedings has tended to be an expensive and protracted process. (See examples noted at our response to question 11.) However, there are other "standard" enforcement responses besides proceedings which the Commission can and does utilise on a regular basis (as set out in the Commission's Enforcement Response Guidelines). This includes out-of-court settlements, and lower level responses such as compliance advice or warning letters, which in our view can be an efficient and effective enforcement and education tool.
3.2 Benchmark of approaches to alternative enforcement mechanisms	
23	***Has the Ministry accurately identified the main types of alternative enforcement mechanism that a given country can adopt? If not, please explain why.***
	Yes, the Ministry has broadly identified the more substantive alternative enforcement mechanisms. We would add that lower level enforcement responses (such as compliance advice or warning letters) are also generally available and commonly used.
3.3 The New Zealand regime	
24	***Has the Ministry accurately described the main elements of New Zealand's alternative enforcement mechanisms? If not, please explain why.***
	Yes, the Ministry's description of the main elements of New Zealand's alternative enforcement mechanisms appears broadly correct. We would add that, notwithstanding the wording of section 74A(3)(a) of the Act (ie that at order "*may require a person to do something only if the Commissioner is satisfied that restraining the person from engaging in the conduct will not restore competition, or the potential for competition, in a market*") we may be less convinced that the Cease & Desist Commissioners could (or would) in fact mandate positive action.

3.4 Framework for assessment	
25	***Has the Ministry identified the right criteria for assessing the adequacy of alternative enforcement mechanisms under the Commerce Act? Should any criteria identified be excluded, or should criteria not mentioned be added?***
	The criteria identified by the Ministry for assessing the adequacy of alternative enforcement mechanisms under the Act seem sensible.
26	***For the criteria that the Ministry has included, have they been accurately described? If not, please explain why.***
	Yes, broadly speaking the criteria seem to have been accurately described.
3.5 Assessment of the New Zealand regime	
27	***Do you agree that the current settlements regime has a number of weaknesses? Please give reasons for your answer.***
	While negotiated settlements may avoid a costly and lengthy court process, we agree with the Ministry that there are weaknesses with the regime. These include the need for penalties to be approved by the High Court, and the difficulties faced by the Commission in enforcing the terms of a settlement agreement. (In our experience, parties often settle with the Commission on a simple cost-benefit analysis ie it would be cheaper to settle now and "get it over with" than to defend the charges in court – even if the chances of success or a lower penalty are good.) It is also arguable, in relation to section 36, that another practical weakness of the settlements regime is that it is only as good as the threat of enforcement. In other words, given the Commission's views on the current workability of section 36, the threat of section 36 proceedings could be seen as an "empty threat" by both the Commission and the party whose conduct is being investigated. In that environment, settlement would seem unlikely. We would expand on the Ministry's comment that negotiated settlements "*fail to generate case-law*", adding that as the Commission's "library" of settlement agreements grows, there is a potential risk that they create "settlement-made law". This could in turn be seen as creating "artificial precedents" when other parties are negotiating settlements, or the courts are imposing penalties, as such settlements may not adequately reflect the fact that the party to the agreement may have successfully defended any proceedings brought against them, or had a lower penalty imposed by the court. We support further consideration of an enforceable undertakings regime under the Act. This could be aligned with the enforceable undertakings regime recently introduced under the Fair Trading Act. We continue to support the view that New Zealand should adopt a behavioural undertakings regime to mirror s87B (Enforcement of Undertakings) of the *Australian Competition and Consumer Act 2010*.[41]
28	***Do you agree that the cease and desist regime has proven ineffective? Please give reasons for your answer.***
	Yes. This is evident in the fact that the regime has only been used once in its 14-year history. The cease and desist regime was not supported by the Commission when introduced.
29	***Should the Commerce Commission make more use of the cease and desist process? Please explain why / why not.***
	No. We agree with the Ministry's views that, even if the Commission were to make more regular applications under this process, the delays involved would likely mirror those of the courts, and the requirement for urgency would likely limit the applicability of the regime.
30	***Do you agree that the settlements regime has proven simple enough to be cost-effective and timely, and that it is adequately predictable? Please explain why / why not.***
	We broadly agree that the settlements regime has proven simple enough to be cost-effective and timely (relative to court proceedings), and that is has become adequately predictable in most cases. Our general concerns with the settlements regime are noted at our response to question 27.
31	***Do you agree that the cease and desist regime, if it were used, would be unlikely to be cost-effective, timely and predictable? Please explain why / why not.***

[41] Matthews & Meech, para 7.

	Given the lack of precedent or empirical evidence in New Zealand, it is difficult to comment fully on this question. However, as noted we agree with the Ministry's views that, even if the Commission were to make more regular applications under this process, the delays involved would likely mirror those of the courts, and the requirement for urgency would likely limit the applicability of the regime.
32	***Do you agree that the settlement regime and the cease and desist regime both adequately protect the rights of firms? Please explain why / why not.***
	We broadly agree that the voluntary nature of the settlements regime, and the safeguards established for the cease and desist regime, would appear to adequately protect firms' right to natural justice.
33	***Do you agree that there is a continued need for a settlement process, but a reduced need for an ad hoc adjudicative process such as the cease and desist regime, compared to the position in 2001? Please explain why / why not.***
	We see a continued need for "out-of-court" enforcement responses for conduct that risks contravening the Act. However, as noted above both the current settlement process and cease and desist regime have weaknesses that could be addressed. We support further consideration of an enforceable undertakings regime under the Act (similar to the one recently introduced under the Fair Trading Act). Other mechanisms may be worth considering.
34	***Do you agree with the way that the Ministry has described the alignment and misalignment of the settlement process under the Commerce Act, on the one hand, with settlement processes under other legislation enforced by the Commerce Commission, on the other? Please explain why / why not.***
	We support, in principle, consistency and alignment between the legislation enforced by the Commission. In particular, as noted above, we support further consideration of an enforceable undertakings regime under the Act.
35	***Do you agree that the cease and desist regime is misaligned with other relevant legislation?***
	Of the legislation enforced by the Commission, the cease and desist regime is unique to the Act.
36	***Do you think that the cease and desist regime unduly duplicates the (interim) injunction process?***
	We understand that the cease and desist regime has been criticised as offering little benefit over an interim injunction, while arguably being more complex. The Ministry's comparison of Key Enforcement Responses (Table 4) is helpful.
3.6 Conclusion	
37	***Given the criteria for assessment it has used, is the Ministry's assessment of the current New Zealand approach to alternative enforcement mechanisms well-reasoned?***
	Yes, in our view the Ministry's assessment seems to be considered and well-reasoned.
38	***If you are submitting that the criteria for assessment should be different from those used by the Ministry, how might the assessment be different using your preferred criteria?***
	No comments at this stage.
39	***Do you agree with the Ministry's conclusion? Please explain why.***
	Yes, we broadly agree with the Ministry's conclusions, subject to the additional comments noted in this section.
40	***Do you have any other comments you wish to make about the Ministry's approach to assessing the current approach to alternative enforcement mechanisms under the Commerce Act?***
	No further comments at this stage.
3.7 Potential options for reform	
41	***Which of the potential options identified would you like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would be worthy of consideration.***
	In our view it would be beneficial to canvass all noted options if the Ministry publishes an options paper this year. The options paper stage would seem to be the appropriate time to conduct a full analysis of the various options, and to allow submitters to discuss and compare the options' respective benefits and detriments (ie it may be premature to discount any one option at the Issues Paper stage).

42	***Which of the potential options identified would you NOT like to see discussed if the Ministry publishes an options paper next year? Please explain why these options would not be worthy of consideration.***
	Refer to our response to question 41.
43	***Are there any other potential options that the Ministry should consider? For example, could better use be made of arbitration proceedings under the Arbitration Act 1996?***
	No comments at this stage.
44	***In the event that an options paper is issued, what criteria should the Ministry use to assess the options set out in the Issues Paper? In principle, should they be the same as whatever criteria are finally used to assess the adequacy of the New Zealand regime?***
	In principle, we agree that the criteria used to assess the options in the Issues Paper should be the same as whatever criteria are finally used to assess the adequacy of the New Zealand regime.

Market studies

4.5 Is there a gap?	
45	***Do the approaches to market studies described in the Issues Paper align with a gap in New Zealand's institutional settings for promoting competition?***
	We agree that there appears to be a misalignment between New Zealand and some of its major trading partners, and support further consideration of an explicit power to conduct market studies. While market studies will inevitably impose "participation costs" on businesses which would need to be managed, they nevertheless provide an opportunity for those businesses to influence future law reform in the industry within which they compete.
46	***What procedural settings for a market studies power would best fit the identified gap, in terms of:*** ***a) Who may initiate a market study;*** ***b) Who should conduct market studies;*** ***c) Whether mandatory information-gathering powers would apply;*** ***d) The nature of recommendations the market studies body could make; and*** ***e) Whether the government should be required to respond.***
	As noted above, we support further consideration of an explicit power to conduct market studies. While such a function often falls within the ambit of the competition regulator, given its primary role as enforcer of the Act there may be a risk that the Commission may not be seen as impartial if it initiated and conducted its own market studies. (We do not have a view at this stage.) An alternative to consider is whether the Productivity Commission is better placed to conduct market studies (on competition issues informed by Government), given its existing mandate and experience conducting in-depth market inquiries. That said, we have been impressed with the Commission's use of its powers under section 9A of the Telecommunications Act 2001. We agree with the IBA that "[g]*iven the powerful remedial aspect of market investigations, it is important that such a tool be used sparingly and be subject to appropriate judicial oversight*."[42] Putting aside who the appropriate market studies body might be, we consider that caution should be exercised in deciding whether mandatory information-gathering powers should apply to market studies. While we acknowledge that voluntary information requests may lead to less complete information sets, in our experience, mandatory information demands (eg a section 98 notice) can be invasive, and are often framed in an excessively broad and vague nature. They also impose significant costs on the recipient of the demand, and are a strain on staff resources. A well designed market study would ideally incentivise market participants to respond fully to voluntary information requests. We see merit in a market studies body being able to make non-binding recommendations, and consider it would be beneficial if the Government was required to respond.

[42] IBA Paper, para 7.3.