Matthews Law
COMPETITION · REGULATION · POLICY · STRATEGY

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Submission on Commerce Amendment Bill 2021

Overview

1. We thank the Economic Development, Science and Innovation Committee (**Committee**) for the opportunity to submit on the Commerce Amendment Bill 2021 (**Bill**). We commend the work done in drafting the Bill, and all the work leading up to it, especially in relation to reform of section 36. The subject of section 36, unilateral anti-competitive conduct, is widely recognised as one of the most complex areas in competition law.

2. Matthews Law is a specialist competition law firm. We have previously submitted in relation to these issues to MBIE for its *Targeted Review of the Commerce Act* in 2016[1] and *Review of section 36 of the Commerce Act and other matters*[2] in 2019. We also submitted to the Australia Government's *Options to Strengthen the Misuse of Market Power Law – Discussion Paper* in 2016, which subsequently led to the reforms this Bill now proposes for section 36.

3. We approach this matter aware of different views within our own client base, involving both large and small entities, and access providers and access seekers. We therefore do not seek to advance a particular position but instead make observations that we trust assists in developing good law.

Reform of section 36

The case for reform

4. It is clearly unsatisfactory when the regulator of the Act, the Commerce Commission (**Commission**), genuinely believes that the law is unenforceable and acts accordingly.[3] Either the regulator is correct and there needs to be change or the regulator needs to be redirected or changed. We consider that the Commission's concerns are genuine. This is not a matter of seeking law that is easier to apply, as the proposed law would still be a high hurdle, particularly given the need to demonstrate actual or likely substantial anti-competitive harm in a relevant market.

5. It is also unsatisfactory that the existing law is unclear, complex, and seems to provide an excessively broad safe harbour, yet conversely could still be applied in other situations when there may be no material anti-competitive effects. We submit that the law had, despite the Supreme Court's statements in the "*0867*" judgment,[4] diverged from the then-applicable Australian equivalent.

6. Arguments in favour of changing the law include clarifying the law. If this is to be done, consistency with Australian law and the pre-existing tests in sections 27 and 47 of the Commerce Act seems sensible.

[1] Our submission: https://www.mbie.govt.nz/dmsdocument/2326-matthews-law-redacted-targeted-review-commerce-act-phase-one-submission-pdf
[2] Our submission: https://www.mbie.govt.nz/dmsdocument/7080-matthews-law-review-of-section-36-of-the-commerce-act-and-other-matters-submission-pdf
[3] See the Commerce Commission's submission on the Review of section 36 of the Commerce Act and other matters (1 April 2019): https://www.mbie.govt.nz/dmsdocument/7069-commerce-commission-review-of-section-36-of-the-commerce-act-and-other-matters-submission-pdf
[4] *Commerce Commission v Telecom Corporation of New Zealand Limited* [2010] NZSC 111 at [31].

a. Australia's section 46 of the Competition and Consumer Act 2010 (**CCA**), which our current test was originally based on, adopted an "effects" test following the 2015 Harper Review. Canada also uses an "effects" test.[5]

b. Consistency with Australia allows New Zealand courts and practitioners to draw from Australian case law. It also has the benefit of promoting the trans-Tasman Single Economic Market agenda and decreases legal compliance costs of Australian firms wanting to expand to New Zealand and New Zealand firms expanding to Australia.

7. The proposed law change seems a principled one, with a focus on impact on markets rather than individual competitors. This appears more economics-based, consistent with international trends.

8. However we remain perplexed at the inclusion of a "purpose" element which seems inconsistent with an economic-effects-based test. Any potential gaps would seem addressed by section 80(1)(b) which captures attempts.

Areas to consider in more detail

Access pricing

9. One glaring omission from the Bill, however, is guidance regarding access pricing. The existing law is, despite any perceived deficiencies in other areas, clear – and arguably "fit for purpose" – around access pricing. The combination of the requirement of both ECPR **and** compliance with Kahn's principle of parity (the latter aspect often being forgotten) as specified by the Privy Council in *Telecom v Clear Communications* is quite clear.[6] The law change would apparently remove this, leaving a vacuum.

10. We consider this omission to be an unusual gap and **strongly recommend** that the law change either clearly provides that this principle applies or provides alternative principles (as was the situation in relation to telecommunications reform).

Potential concerns about law change

11. The concerns about law change must be taken seriously. These should be addressed to the extent possible. Particularly when, while there may be some reliance on Australian jurisprudence, New Zealand is less likely to have guidance from New Zealand cases.

12. Concerns about "chilling effect" on larger firms and / or uncertainty must be taken seriously and addressed. This could be done in a variety of ways, for example implementing rebuttable presumptions for predatory pricing, implementing clear rules on access pricing, applying an imputation test for bundling, and reversing the onus of proof for refusals to supply/delays.

13. We wonder if it is worth considering defining the term "conduct" so that larger organisations may know the range of their activities that may be looked at. Perhaps certain matters should be included or excluded from the definition of "conduct" (for example, issuing legal proceedings). That said, despite the best of intentions, the "black letter" drafting in relation to the cartel provisions and exceptions has arguably overcomplicated the law and may have inadvertently made it non-intuitive, at least to non-specialists (and possibly including some specialists). So it may be better to leave this to the courts.

[5] Competition Act 1985 (Canada), section 79.
[6] *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (PC).

Trans-Tasman provisions

14. The Bill does not propose changes to section 36A, which uses the current taking advantage test and has an intellectual property exception. The taking advantage test therefore would be largely preserved for markets not exclusively for services. Section 46A of Australia's CCA has a similar provision. We wonder whether there are plans for New Zealand to coordinate with Australia in updating the trans-Tasman provisions to use the effects test as well.

Enforcement measures

15. We query also whether consideration should be given to a fast track / interim process given the time and costs of proceedings and weighing up the potential harms. The cease & desists powers were not a complete success as they essentially mimicked the interim injunction process.

16. More efficient methods for resolution could be explored, for example extending the authorisation regime proposed in the Bill to allow for "block exemptions" of categories of conduct, rather than specific cases of conduct, or allowing the Commission to issue preliminary directions to stop anti-competitive behaviour. A binary outcome of nothing or high penalties may not always be appropriate where there is genuine disagreement as to whether the conduct is anticompetitive, especially if the alternative enforcement mechanism prevents anti-competitive effects.

Repeal of intellectual property exceptions

Guidance on how new law will apply to use of intellectual property rights would be helpful

17. As we have previously submitted, we can see why the intellectual property exceptions and their removal may be viewed as inconsequential given the current interpretation of section 36. Intellectual property rights (**IPR**) have also been accepted to be like any other property right, which do not warrant special treatment under competition law. However, we also understand that there may be scope for uncertainty around the treatment of IP rights and their use.

18. A common issue which we deal with is refusals to licence IPR. Such a refusal might be seen as exclusionary, yet in most cases we deal with the IPR holder has invested considerably in those rights, at its risk, and may wish to fully exploit those rights and prevent "free-riding". We consider such a refusal may often be pro-competitive (ie does not substantially lessening competition in an appropriately defined market) as it encourages innovation, both by the IPR holder and the third party who may be spurred to innovate.

19. We recommend that consideration be given to explaining exactly how the effects test would apply to common situations (eg refusals to license IPR, know-how etc) and/or what pricing principles might apply to any licensing obligations.

Addition of covenant cartel provisions

We would like to confirm the intended effect of clauses 12 and 13

20. We understand that clause 13 of the Bill extends the section 31 collaborative activity exception to covenant cartel provisions. Under section 30C cartel provisions are generally unenforceable. The Bill does not carve out cartel covenant provisions exempted under section 31 from section 30C. Therefore, a covenant cartel provision exempted under the collaborative activity exception is still unenforceable. We wish to confirm whether this is the intended effect of these provisions.

21. Additionally, clause 12 of the Bill provides "*nothing in subsection (1) affects the enforceability of a cartel provision in … a contract or covenant to which section 33 applies*" however the Bill does not amend section 33 so there are no covenants to which section 33 applies. We wish to confirm whether this is the intended effect of these provisions.

Increase of merger penalties

Increase in merger penalties is consistent and more proportionate

22. The increase in penalties for anti-competitive mergers brings them in line to those that apply for restrictive trade practices. In terms of proportionality, anti-competitive mergers may have a greater anti-competitive effect than restrictive trade practices because the merger will completely remove the target as a competitor, so penalties for anti-competitive mergers should not be less than those for restrictive trade practices.

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